Supreme Court, U.S.
FILED

No. 93-1779 MAY 6 1994

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In the Supreme Court of the United States

October Term, 1994

William A. Calvo, III,
Petitioner

- against -

The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126

Dated: May 8, 1994

QUESTIONS PRESENTED

1. **DUE PROCESS:**

A. Was former Disciplinary Rule 1-102(A)(6) on which the Florida Supreme Court based its decision unconstitutionally vague?

B. Did the proceeding below violate the Petitioner's[1] rights to due process under the 14th, 5th, 6th and 8th Amendments to the United States Constitution, *to wit*, the rights to:

(1) Assistance of legal counsel?

(2) Timely notice?

(3) A timely hearing?

(4) Meaningful discovery?

(5) Mandatory judicial notice?

(6) Presentation of relevant evidence?

(7) Exclusion of incompetent evidence?[2]

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1. Hereafter referred to as "Mr. Calvo."

2. *E.g.*, testimony of experts as to statutes or rules, in lieu of introduction of the statute or rule; introduction of final judgments in cases involving lower standards of proof; introduction of third hand hearsay testimony, despite access to original declarant, *etc.*

2. **EQUAL PROTECTION**: Did the proceeding below deprive Mr. Calvo of his rights under the equal protection clause of the 14th Amendment by denying him:

A. The rights guaranteed to defendants by the Constitution of the State of Florida?

B. The right to a decision based on the legal factors previously established by the Florida Supreme Court in conjunction with attorney disciplinary proceedings?[3]

C. The right to non-arbitrary imposition of discipline?

D. The right not to be subjected to cruel or unusual punishment?

E. The right not to be singled out based on his national origin or other minority status?

3. **EX POST FACTO LEGISLATION**: Did the Florida Supreme Court's re-interpretation of the obligations of Florida attorneys when acting as underwriter's counsel

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3. *E.g.*, the right to enforcement of the standards for invocation of the doctrines of timely proceedings, latches, waiver, estoppel, method for allocating costs, evidentiary standards, repealed rules regulating conduct, requirement for proof that attorney-client relationship exists, *etc.*

constitute a Constitutionally prohibited *ex post facto* law?

4. **FEDERAL QUESTIONS:**

A. Did the Florida Supreme Court improperly interpret the following federal questions:

1. The role of underwriter's counsel under Securities and Exchange Commission[4] Rule 436?

2. The requirement of counsel to participate in sales activities under federal securities laws?

B. The effect of the Court's interpretation of Section 10(b) of the Securities Exchange Act of 1934, as amended, in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), on Securities and Exchange Commission injunction and Rule 2e actions based on aider or abettor theories.

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4. The United States Securities and Exchange Commission is hereinafter referred to as the "Commission."

LIST OF PARTIES

The Parties to the proceeding below are:

William A. Calvo, III

Petitioner

11355 Southeast 54the Court; Belleview, Florida 34420

Telephone Number (904) 245-4126

THE FLORIDA BAR

650 Apalachee Parkway

Tallahassee, Florida 32399-2300

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5. Footnotes to the cases contained in the Appendix are numbered sequentially throughout each Appendix Volume, rather than as numbered in the decisions, due to the requirements of the word-processing program utilized to prepare them.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

United States

Article One, Section Nine, [3], pages 13, 26, 31, 58, 60 and 62.

Fifth Amendment, pages 2, 26, 31, 42 and 53.

Sixth Amendment, pages 2, 26 and 31.

Eighth Amendment, pages 2, 26 and 53.

Fourteenth Amendment, pages 2, 26, 31, 42, 50 and 53.

Florida

Article One, Section Two, pages 2, 26, 33, 42 and 47.

Article One, Section Nine, pages 2, 26, 33 and 42.

Article One, Section Sixteen, pages 2, 26, 33 and 42.

Article One, Section Seventeen, pages 2, 26 and 53.

RULES AND STATUTES

Securities and Exchange Commission

Rule 436 of Regulation C, promulgated by the Commission under authority of Section 6 of the Securities Act of 1933, as amended, 17 C.F.R. 230.436, pages 3,

19, 21, 35, 59[6] and 62.

Florida Bar

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Rule 1-102(A)(1), pages 3 and 13.

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Rules Regulating the Florida Bar

Rule 3-7.4(k), pages 3, 13, 39 and .41

Rule 4-1.2, page 3.

Rule 4-3.7, pages 3, 16 and 34.

Florida Evidence Code

90.616(c), pages 2, 16 and 34.

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6. A reference is also made on page 59 to Securities and Exchange Commission Rule 478 of Regulation C, promulgated by the Commission under authority of Section 6 of the Securities Act of 1933, as amended, 17 C.F.R. 230.478.

CASES

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D'Alemberte v Anderson, 349 So.2d 164 (Fla. 1977), page 31.

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Florida Bar v William A. Calvo, III, Case Number 78,395, 630 So.2d. 548 (Fla. 1993), pages 1, 11, 24, 31, 38, 44, 45, 50, 51, 55 and 57.

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The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992), pages 53 and 54.

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page 56.

Fort v Fort, 104 So.2d 69 (1st DCA, 1958), page 31.

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In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), page 1, 10, 18, 25, 33, 44 and 45.

Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), page P-3, 10, 18, 20, 25, 29 and 63.

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The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, Commission Administrative Cases Number 3-6953 and 3-6907, pages 2 and 25.

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Mooney v Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed 791, (1935), page 34.

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Florida Bar, *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys* (1987), pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36,

7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46; pages 21, 35, 60 and 61.

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Loss, Fundamentals of Securities Regulation; *Little, Brown and Company, 1983,* at pages 1034, 1035, 1234 through 1242, and 1256, page 62.

Matthew Bender, 1992, at pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119, page 62.

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Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980), pages 21 and 22.

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PETITIONER, William A. Calvo, III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court in the case of Florida Bar v William A. Calvo, III (the "Calvo Case"), Case Number 78,395, 630 So.2d. 548 (Fla. 1993), affirming the recommendation of the referee in the underlying Bar Disciplinary Proceeding. Mr. Calvo's motion for rehearing was denied (the "Rehearing Motion") on February 14, 1994.

I. OPINION BELOW

The opinion of the Florida Supreme Court in this matter and its denial of the Rehearing Motion are included in the separate Appendix transmitted herewith. The recommendation of the referee in the underlying Florida Bar proceeding is also included in the Appendix.[1]

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1. The facts underlying the decision in the case below have also been considered in three previous series of cases, Commission v Electronics Warehouse, *et. al.*, 689 F. Supp. 53 (D. Conn. 1988), *affirmed* 891 F.2d 457 (2nd Cir. 1989), *cert. denied* 110 S.Ct. 3228, 110 L.Ed. 2d 674 (1990), hereinafter referred to as the "Injunction Case;" In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), hereinafter referred to as the "2e Case (a copy is included in the Appendix);" and, Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, 563 F.2d 385 (11th Cir. 1992), *affirmed without opinion*, hereinafter referred to as the "Gallagher Appeal," an appeal of the Commission's

II. JURISDICTION

The opinion of the Florida Supreme Court was filed on December 16, 1993. The Rehearing Motion was denied, without comment, on February 10, 1994. The Jurisdiction of this Court is invoked pursuant to 102 Stat. 662, 28 U.S.C. Section 1257 (June 27, 1988).

III. CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS

CONSTITUTIONAL PROVISIONS: Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Article One, Sections Two, Nine, Sixteen and Seventeen of the Florida Constitution.

STATUTORY PROVISIONS: Sections 90.616(c) and 90.203 of the Florida Evidence Code.

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decision in the administrative action encaptioned The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, SEC File No. 3-6952, hereinafter referred to as the "Gallagher SEC Case." As a result of the Florida Supreme Court's decision, the United States Courts of Appeal for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Florida have initiated proceedings to consider Mr. Calvo's continued fitness for membership in their respective Bars. Copies of the motions to show cause and Petitioner's response thereto are included in the Appendix.

REGULATORY PROVISIONS: Rule 436 promulgated under authority of the Securities Act of 1933, as amended, (17 C.F.R. Section 230.436). Former Disciplinary Rules 1-102(1) and 1-102(a)(6) and current Rules 3-7.4(k), 4-1.2 and 4-3.7, subsections (1), (2) and (4) of the Rules Governing the Florida Bar.[2]

IV. STATEMENT OF THE CASE

During September of 1984, Mr. Calvo's law firm[3] prepared one draft of a post effective amendment to the registration statement for the Electronic Warehouse, Inc. ("Warehouse"), which was integrated into materials prepared by other persons and filed with the Commission by such other persons. Three subsequent amendments to the registration statement were prepared by persons other than the Calvo Firm. Only the last post effective amendment was declared effective.[4]

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2. The texts of the foregoing provisions are included in the Appendix. For purposes of economy, the "Rules Regulating the Florida Bar" will be hereinafter referred to as the "R.Reg.F.B."

3. Hereinafter, together with its successors in interest, referred to as the "Calvo Firm."

During September of 1984, the Calvo Firm also agreed to file the state securities registration applications (a function referred to as Blue Sky counsel) and the amended Warehouse registration statement with the National Association of Securities Dealers, Inc. (the "NASD"), on behalf of the underwriter.[5] Consequently, the Calvo Firm was described in the first post effective amendment as having served as counsel to the underwriter.[6] During October of 1984, Mr. Calvo was advised that the Calvo Firm would not be serving as Blue Sky or underwriter's counsel, having been replaced by a New York law firm, required in order to expedite NASD review of the post effective

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4. On November, 8, 1984. Those facts were admitted by Bremer, the Florida Bar's principal witness, in affidavits to the Commission used in the Injunction Case. No request for acceleration of the post effective amendment was filed by the Calvo Firm on behalf of the underwriter, any such request having been provided by the Beer Firm (as hereinafter defined).

5. The principal function as underwriter's counsel to have been undertaken by the Calvo Firm.

6. The scope of such representation was limited to the functions described because Warehouse and the underwriter desired to limit legal expenses and thus elected to rely on former underwriter's counsel for all other functions normally associated with underwriter's counsel's activities.

amendments.[7] After October 24, 1984, the Calvo Firm terminated all active Warehouse related activities. All Blue Sky work and NASD filings were prepared, filed and negotiated by the Beer Firm, and the request for acceleration of the last post effective amendment was provided, on behalf of the underwriter, by the the Beer Firm. Inexplicably, the Warehouse prospectus continued to list the Calvo Firm as counsel to the underwriter.[8]

The underwriter was a client of the Calvo Firm in other matters including the public offering of securities for Dennison, Inc.;[9] and, its principals were personal friends

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7. The law firm of Robert Beer and Stephen Wilkes (the "Beer Firm"). A retainer agreement was signed by the Beer Firm with Warehouse on or about October 24, 1984, and a letter referring thereto dated November 12, 1984, was included as an exhibit to Mr. Calvo's answer to the Florida Bar's complaint in the Florida Bar proceeding. Additional exhibits to such answer included excerpts from Bremer's diaries noting that the Beer Firm was responsible for the NASD and Blue Sky filings (exhibit B-2.10(g)(3) to Mr. Calvo's answer). Based on a review of Mr. Bremer's diary entries, it is clear that the Beer Firm had previously been selected to perform the tasks offered to the Calvo Firm, since the relationship with the Beer Firm was established during June of 1984.

8. As inexplicably, the records of the Commission continued to list the original law firm involved with the underwriter as underwriter's counsel, and all correspondence to underwriter's counsel was sent thereto, rather than to either the the Beer Firm or the Calvo Firm.

9. In which Barnett Bank also served as the escrow agent.

of Mr. Calvo and his wife. Consequently, on a limited number of occasions during the offering period, Mr. Calvo was contacted by the underwriter for help in developing an underwriting syndicate.[10] In response to such requests, Mr. Calvo provided the names and telephone numbers of three people to the Warehouse Principals[11] (David E. Jordan, Hermann Burckhardt and Francesca Daniels). In addition, the principal of the underwriter and Mr. Calvo discussed the possibility that the Calvo Firm would represent the underwriter at the Warehouse closing.[12]

On two occasions during the offering counsel to Warehouse contacted Mr. Calvo requesting advice.[13] Once

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10. Mr. Calvo neither asked for nor received any compensation for such assistance.

11. For purposes of this Petition, the phrase Warehouse principals will refer to Edward Bremer, Warehouse's president, and Gary Granai, Warehouse's attorney.

12. Such discussion first took place during January of 1985; however, no closing took place at that time and the Calvo Firm was not re-retained, although draft closing documents were provided to the Calvo Firm by legal counsel to Warehouse.

13. On neither occasion did Mr. Calvo request or receive compensation for sharing his legal observations. The testimony of former Commission staff member Jack Stein introduced by Mr. Calvo at the Florida Bar hearing made it clear that Mr. Calvo regularly provided informal, uncompensated assistance to colleagues, with reference to questions involving securities law.

during March of 1985 and the second on or about April 15, 1985. On the first occasion, counsel to Warehouse informed Mr. Calvo that the president of Warehouse had been indicted[14] and was advised by Mr. Calvo that such person should resign and a post effective amendment disclosing such fact filed.[15] On the second occasion, counsel to Warehouse asked about the legality of guaranteeing an investor a profit. After advising counsel to Warehouse that such guarantees were illegal and inappropriate, Mr. Calvo expressed surprise that the Warehouse offering was still pending in light of Bremer's indictment. At that time he was told that the indictment had been dropped.[16]

On April 19, 1985, without notice, the Warehouse Principals and the principal of the underwriter[17] appeared

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14. Although Warehouse's attorney assured Mr. Calvo that Bremer was innocent and the matter was minor and in the process of being worked out.

15. Mr. Calvo informed the principal of the underwriter of such conversation and conclusion. He also advised the underwriter that the indictment gave the underwriter a basis for withdrawing from the offering.

16. Until the testimony at the Florida Bar final hearing, Mr. Calvo did not recall whether he had been told that the indictment had been dropped or was in the process of being dropped; however, testimony by Joseph Caruncho, a former employee of Mr. Calvo called as a witness by the Florida Bar, clarified such point.

17. Collectively referred to in this Petition as the "Closing Party."

at Mr. Calvo's office and stated that they were closing on the Warehouse offering, that day. Because the Calvo Firm had been provided no time to prepare for a closing[18] it declined to be re-engaged as underwriter's counsel; however, as a favor to the underwriter, Mr. Calvo permitted the Closing Party to use a conference room and made a recently hired associate[19] available to assist in clerical matters.[20] Mr. Calvo also informally responded to questions by the underwriter based on facts provided by the Warehouse principals;[21] joined the Closing Party briefly during lunch; and, in response to a telephone request during the afternoon, spoke to an acquaintance of

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18. Mr. Calvo was preparing for a Florida Bar hearing on a minor matter scheduled for Monday, April 22, 1985, and was personally unable to provide closing related assistance in any meaningful fashion. Although he requested a continuance of such hearing, the Florida Bar refused to grant it.

19. He had passed the Florida Bar Exam but was awaiting admission that month.

20. Mr. Calvo neither asked for nor received any compensation for such assistance.

21. After making it clear that he could not, based on the time provided, either research the issues or verify the facts. Mr. Calvo suggested a trust closing pending verification of the alleged facts. Although the Closing Party agreed to such procedure, Bremer and Granai failed to abide by such agreement.

Bremer concerning repayment of a loan using offering proceeds[22] to which Bremer claimed entitlement.[23]

Rather than closing on Friday, April 19, 1985,[24] the Closing Party postponed the closing until Monday (April 22).[25] Mr. Calvo declined to provide any legal opinions or participate in the closing but at the request of the Closing Parties, he prepared and delivered disbursement instructions to the escrow agent, after the closing had started.[26]

The Warehouse closing was illegal for three reasons. First, the escrow agent miscalculated the escrow period by fifteen days; second, Bremer's indictment had not been dropped; and, third, the minimum offering amount was not met (Bremer borrowed funds to make it appear that the minimum had been met and repaid the loans from offering

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22. Bremer claimed to have advanced funds for expenses to have been paid from offering proceeds.

23. Mr. Calvo and his wife also ran into the Closing Party, and others, that evening at a Fort Lauderdale restaurant.

24. After having left Mr. Calvo's offices, purportedly to go the the offices of the escrow agent to close the offering.

25. The date of the hearing which the Florida Bar refused to postpone.

26. By that time, the instructions had been provided directly to the escrow agent by the Closing Party.

proceeds to which he was not entitled).[27]

During March of 1986, the Commission initiated the Injunction Action and included Mr. Calvo as an aider and abettor based on allegations that he had served as underwriter's counsel throughout the offering, was responsible for amending the registration statement to keep it current and had been reckless in not preventing the fraudulent closing. During June of 1987, an injunction was issued against Mr. Calvo based on a motion for summary judgment by the Commission[28] (a motion for reconsideration was denied during June of 1988). Based on the injunction the Commission initiated an action under its Rule 2e which resulted in a two year suspension of Mr. Calvo from practice before the Commission (the 2e action).[29] The suspension was completed during July of 1990.

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27. The Commission Judge in the 2e Case found that Bremer and Bremer's attorney had deceived Mr. Calvo on such points.

28. The Court is asked to note that its decision in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), would have made that action untenable.

29. Like the Injunction action, the predicate for the 2e proceeding has been removed as a result of this Court's recent decision in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

Florida Bar proceedings were initiated in 1987;[30] however, Mr. Calvo was never advised of their initiation or of the identity of the complainant. During the summer of 1988, Mr. Calvo was notified that a complaint was being referred to Grievance Committee 17(c) for investigation and Mr. Calvo immediately turned over all his Warehouse files to the attorneys appointed to investigate the matter.[31] During June of 1989, the Grievance Committee held an evidentiary hearing; however, it refused to grant a continuance requested by Mr. Calvo's attorney as a result of which Mr. Calvo was un-represented by counsel.[32]

The Florida Bar presented its case and witnesses; however, the Grievance Committee did not permit Mr. Calvo to rebut due to the lateness of the hearing and instructed him to prepare a written submission which it would consider and thereafter reconvene to provide Mr.

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30. Florida Bar case number 87-21,392(17C).

31. Those files were eventually lost by the Florida Bar.

32. The Florida Bar took the position that Mr. Calvo did not have a right to attend the hearing, to legal counsel thereat, to cross examine witnesses or to testify; rather, the Florida Bar claimed that all of such activities, if permitted, would be at the sufferance of the Florida Bar.

Calvo an opportunity to respond to questions.[33] Mr. Calvo prepared and filed a submission but the Grievance Committee never reconvened to question him; rather, it appears that one or more of its members reached a decision during September of 1989, which was neither put in writing nor communicated to Mr. Calvo.

After completion of his 2e suspension in 1990, Mr. Calvo contacted the Florida Bar to ascertain his status. By written certification he was informed that he was in good standing whereupon he returned to Florida[34] and re-established his legal practice. He heard nothing from the Florida Bar until August of 1991, when he was served with the initial complaint.[35] The initial complaint had been hastily drafted and was never signed by the presiding officer of the Grievance Committee that purportedly authorized it

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33. In April of 1989, Mr. Calvo and his family moved to North Carolina, where they bought and operated a country inn until after conclusion of the two year Commission suspension.

34. Such move resulted in the loss of the country inn (an investment of more than $400,000).

35. The Complaint was served within weeks after Mr. Calvo entered an appearance participating in the appeal of a Warehouse related Commission decision against the Warehouse underwriter.

(he did not even see it until September of 1992, more than one year after the complaint was filed, and more than three years after he was supposed to have approved it).[36] The initial complaint contained numerous counts that had to be dropped during the summer of 1992, when counsel for the Florida Bar discovered that they had never been authorized and would have involved *ex post facto* enforcement of rules subsequently adopted.

The complaint, as eventually amended, alleged violations of two rules of the former Florida Bar Code of Professional Responsibility, DR 1-102(a)(1) and DR 1-102(a)(6).[37] The first prohibited violation of any disciplinary rule, and the second read as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The Florida Bar filed a motion to limit issues at trial to that of discipline, claiming

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36. The Florida Bar rule governing the subject proceeding, Rule 3-7.4(k), required that the complaint be promptly prepared, signed by the chairman of the grievance committee and promptly served, with proceedings to be concluded, if reasonably possible, within six months thereafter.

37. Hereinafter referred to as "DR 1-102(a)(1)" and "DR 1-102(a)(6)," respectively.

that a violation of Commission Rule 2e was an automatic violation of undefined Florida disciplinary rules. The referee granted the motion but Mr. Calvo appealed to the Florida Supreme Court which rejected the decision and ordered a *de novo* hearing.[38]

During the proceeding, Mr. Calvo's ability to obtain meaningful discovery was circumvented by the referee's lack of jurisdiction over the Commission, which provided assistance solely to the Florida Bar, and by the Florida Bar's refusal to cooperate in discovery. Mr. Calvo filed motions to compel discovery but the referee, instead, granted the Florida Bar's motions for protective orders, as a result of which Mr. Calvo was limited to five interrogatories. Mr. Calvo eventually obtained a number of documents from the Florida Bar pursuant to requests for production; however, the Florida Bar had lost the files originally provided by Mr. Calvo during the investigative stage of the proceeding and had also misplaced its own files for the initial two years of the action. During the ensuing seven years most potential witnesses had disap-

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38. After a resulting delay of one year.

peared or were outside of the referee's jurisdiction.

Immediately prior to the final hearing, Mr. Calvo filed notices required under Florida law for taking of mandatory judicial notice.[39] However, the Florida Bar opposed them and the referee refused to take judicial notice of the requested matters (*e.g.*, the Gallagher Appeal and the record thereof) or to admit any of the evidence involved.

When the hearing convened, Mr. Calvo introduced his attorney, G. Richard Chamberlin,[40] and his law partner, Larry D. Houston, who was to assist Mr. Chamberlin.[41] Florida Bar counsel demanded that they be precluded from participating at the final hearing because Mr. Calvo had previously proceeded on a *pro se* basis. He also objected to Mr. Chamberlin because Mr. Calvo had indicated that he intended to call Mr. Chamberlin as a witness.[42]

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39. Principally involving the Gallagher Appeal where the Commission took the position that Mr. Calvo had provided neither oral nor written opinions authorizing the Warehouse closing, see Section 90.203 of the Florida Evidence Code.

40. Who had successfully represented Mr. Calvo in the Commission 2e proceeding and had represented the Gallaghers in their Warehouse related proceedings.

41. With reference to technical evidentiary matters.

The referee determined that Mr. Chamberlin could either be a witness or Mr. Calvo's attorney whereupon Mr. Calvo stated that he would require Mr. Chamberlin as an attorney to cross examine Bremer (expected to be the Florida Bar's principal witness). Counsel for the Florida Bar then asserted that he intended to call Mr. Chamberlin as a rebuttal witness and demanded that Mr. Chamberlin be barred from the proceeding.[43] The referee agreed and Mr. Calvo was left without his attorney.[44] Notwithstanding the claims of counsel for the Florida Bar it did not call Mr. Chamberlin as a witness or even speak to him about such

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42. In light of the referee's refusal to take judicial notice of the proceedings in the Gallagher Appeal, Mr. Calvo intended for Mr. Chamberlin to testify that, during oral argument before the United States Court of Appeals for the 11th Circuit, counsel for the Commission had, in response to a question from the bench, asserted that Mr. Calvo had provided neither an oral or written opinion authorizing closing on the Warehouse offering. Testimony that the Florida Bar could not have contradicted. Such testimony should have been permitted under Rule 4-3.7, subsections (1), (2) and (3) of the R.Reg.F.B.

43. But see Section 90.616(c) of the Florida Evidence Code, pursuant to which Mr. Chamberlin should not have been excluded.

44. The referee refused to bar Mr. Houston from the proceeding; however, Mr. Houston was utterly unfamiliar with the case, the applicable law, or the potential witnesses. Mr. Houston was then required to immediately proceed with the hearing.

role. In order to preserve his rights on appeal, Mr. Calvo also refrained from calling Mr. Chamberlin as a witness.

At the final hearing the Florida Bar presented five witnesses, Edward Bremer, Marvin Richmond,[45] James Beasely,[46] Joseph Caruncho[47] and the presiding officer of the grievance committee. The testimony of Messrs. Richmond and Caruncho corroborated Mr. Calvo's version of the events and contradicted that of the Florida Bar's prime witness, Bremer. Bremer's testimony was also contradicted by transcripts of sworn testimony provided to the Commission by Gary Granai,[48] and by transcripts of conversations Bremer had taped and which the United States Justice Department had transcribed.[49] The decision of the

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45. The person who was repaid for a loan to Bremer from offering proceeds.

46. An "expert" witness on the issue of underwriter's counsel.

47. A former associate in the Calvo Firm.

48. Warehouse's attorney.

49. Mr. Calvo was not permitted to introduce the copy of such transcripts that he had obtained from the Warehouse underwriter, rather, he was permitted to ask impeaching questions based thereon. Mr. Calvo had intended to enter selected portions of such transcripts, however, the Commission, which had custody of the originals, refused to provide or authenticate them, even when the referee ordered the Florida Bar to use best efforts to obtain them for the hearing.

referee was, however, principally based on two final judgments introduced by the Florida Bar as "evidence" at the final hearing, over Mr. Calvo's objections: the final judgment in the Injunction Case and the final judgment in the 2e Case.[50] Mr. Calvo's objections were based on the fact that both judgments were based on a mere preponderance of the evidence while Florida Bar proceedings required proof by the higher "clear and convincing" standard.

During the hearing, over the objections of Mr. Calvo, the Florida Bar was allowed to introduce multi-stage hearsay evidence by Bremer[51] and to prove that Mr. Calvo had acted as counsel to the underwriter[52] throughout the

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50. Both those judgments were based on aider and abettor liability under Section 10(b) of the Securities Exchange Act of 1934, as amended, a doctrine rejected by this Court in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

51. Concerning what Granai had allegedly told him that Mr. Calvo had said third parties had said they would do, despite the fact that the purported declarants were readily available as witnesses, living in the district in which the hearing was held. The due process clause unquestionably guarantees to a defendant the right to cross examine the governments witnesses, and that right is violated when such witnesses are not presented, but rather, the evidence is presented through multi-stage hearsay. See, *e.g.*, United States v Grande 620 F.2d 1026, at 1035 (4th Cir., 1980).

52. The referee and the Florida Supreme Court both decided that Mr. Calvo had represented both the underwriter and Warehouse in the offering, based on the allegations of the Florida Bar and the testimony of

Warehouse offering[53] by expert testimony[54] to the effect that Commission rules (which could not be cited)[55] made legal counsel to an underwriter an expert for purposes of registration statement liability, that such counsel was consequently required to file a written consent to the use of its name in a registration statement, and therefore could only be replaced through a formal amendment to the registration statement.[56] Since no amendment had been filed removing Mr. Calvo's name as counsel to the underwriter,

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its expert witness, despite Bremer's testimonial admission that Mr. Calvo had never represented Warehouse.

53. No evidence to that effect was testified to by the underwriter, whom Florida Bar counsel declined to call as a witness, or by Mr. Calvo, the only two parties in a position to resolve the issue.

54. His expertise was based on having participated in up to five underwritings as counsel to the underwriter, none of which involved a small offering subject to the rules that applied to the Warehouse registration statement.

55. In fact, he was unable to to cite to any statute, rule or case, other than to the item 24 of the exhibit schedule in Item 601 of Commission Regulation S-K, which, in fact, is the subject of Commission Rule 436.

56. The expert's testimony was diametrically opposed to the actual rule (Commission Rule 436, which specifies as follows in subsection (e) thereof: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity."

he testified that Mr. Calvo remained responsible for the conduct of the entire offering.[57]

The presentation of Mr. Calvo's case was crippled by the Florida Bar's loss of his files, its alleged loss of its own files, the referee's protective order limiting Mr. Calvo's ability to conduct discovery, and, the lengthy, unexplained and un-excused delay by the Florida Bar in bringing the proceeding;[58] it was crippled by the expulsion of his attorney (Mr. Houston[59] did not present any witnesses other than Mr. Calvo, since he was totally unfamiliar with their potential testimony,[60] and did not introduce any materials

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57. Notwithstanding the fact that he received no fee for such function and that another law firm did. See, *contra*, Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

58. Throughout the proceeding, all of the Florida Bar's substantive witnesses claimed an inability to recall events, when cross examined.

59. Who was required to immediately assume the defense, without any time for preparation or consultations with Mr. Calvo.

60. Affidavits contradicting all of Bremer's hearsay allegations were provided from the purported declarants, following the final hearing as supplements to the record, but were rejected by the Florida Supreme Court. In all but one case, the declarants resided in the district in which the Florida Bar's prosecuting office was located and all were readily available for questioning or presentation by the Florida Bar. The single out of state affiant had offered to make herself available to the Florida Bar, as it required.

refuting the expert witness because he was totally unfamiliar with the applicable law);[61] and it was crippled by the vagueness of the rules he was charged with violating, which made preparation for defense virtually impossible since the rule covered virtually anything the Florida Bar might subjectively deem inappropriate.

Mr. Calvo's presentation was crippled by the refusal of the referee, based on the Florida Bar's objections, to permit Mr. Calvo to introduce evidence of the detailed studies and reports concerning the responsibilities of securities lawyers published by the American Bar Association and the Association of the Bar of the City of New York.[62]

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61. The most important and irrefutable contradictory evidence being the text of Commission Rule 436(e), and the following materials describing the role of securities lawyers by the Florida Bar, itself: The lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

62. American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980). Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977). Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37* The Business Lawyer 915 (1982). *Statement of the Section of Cor-*

Mr. Calvo's ability to defend himself was very detrimentally impacted by improper allusions by Florida Bar counsel to Mr. Calvo's birth in the Republic of Colombia followed by citations to disciplinary actions against attorneys involved in narcotics trafficking, implying, that although not charged, as a Colombian, Mr. Calvo was obviously involved in illegal activities.[63]

During December of 1992, the referee found Mr. Calvo guilty of all allegations made by the Florida Bar, even where no supporting evidence had been introduced[64] and agreed with the Florida Bar that because of aggravating factors[65] Mr. Calvo should be disbarred.[66] In addition,

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poration, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980).

63. Such vague implications could indeed have been covered by DR 1-102(a)(6), which could be interpreted to make it improper to have been born in Colombia, or to represent, usually on a *pro bono* basis, Colombian immigrants.

64. *E.g.*, motivation, characteristics of alleged victims, likelihood of future violations, bad character, *etc.*

65. Again as to which no evidence was introduced, other than the allegations made by Florida Bar counsel during closing arguments.

66. Such request was not included in any pleadings and was first raised, to Mr. Calvo's dismay, during closing arguments by the Florida Bar.

despite the fact that the Florida Bar had been forced to dismiss most of its counts against Mr. Calvo and had been reversed by the Florida Supreme Court on the product of its initial year of litigation (the motion to limit issues at trial), the referee awarded all costs[67] to the Florida Bar.

Mr. Calvo filed a petition urging the Florida Supreme Court to reject the referee's findings of fact, conclusions of law and recommendations and in support thereof filed a brief, reply brief[68] and a number of motions for permission to supplement the record. The Florida Bar filed motions to strike the Appeal Briefs, a responsive brief, and objections to any attempts to supplement the record pointing out that any problems therewith were the result of tactical or strategic error's in the presentation of Mr. Calvo's case.[69] At oral argument before the Florida Supreme Court counsel for the Florida Bar claimed that notwithstanding the clarity of the record on such point, Mr.

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67. More than $7,000.

68. The brief and reply brief are hereinafter referred to as the "Brief" and the "Reply Brief" and collectively as the "Appeal Briefs."

69. While at the same time, denying that Mr. Calvo had been prejudiced by the expulsion of Mr. Chamberlin.

Calvo had elected to use Mr. Chamberlin as a witness rather than as his attorney and that Mr. Chamberlin's expulsion was not based on Florida Bar counsel's intent to call Mr. Chamberlin as a witness.[70]

On December 16, 1993, the Florida Supreme Court adopted the recommendations, findings and conclusions of the referee and in a strongly worded decision concluded that Mr. Calvo had represented all of the parties to the Warehouse offering and in such role, was responsible for the sale of the securities offered and for all of the information in the Warehouse registration statement. The decision adopted the conclusions of the Florida Bar's expert witness and ignored all of Mr. Calvo's due process and equal protection arguments. Mr. Calvo then filed the Rehearing Motion in which he expanded on his constitutional arguments. The motion for rehearing was denied without comment on February 10, 1994.

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70. Mr. Chamberlin, upon learning of such allegation, immediately wrote to the chief justice of the Florida Supreme Court, providing supporting affidavits from Mr. Calvo and Mr. Houston, denying the claims of Florida Bar counsel. Florida Bar counsel responded by characterizing such letter as an improper attempt to influence the Court.

V. REASONS FOR GRANTING WRIT

1. The underlying subject matter has been the subject of actions before the Commission, and, the United States Courts of Appeal for the Second and Eleventh Circuits. The two Commission decisions reached inconsistent results, as did the decisions in the Second and Eleventh Circuits.[71]

Related disciplinary matters based on the Florida Supreme Court decision are pending in the United States Courts of Appeal for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Florida thus this case will impact the role of attorneys not only within the State of Florida, but also in more than one third of the United States Courts of Appeal. The United States Court of Appeal for the Fifth Circuit has affirmatively deferred a decision in the matter until such issue is considered by this Court and the other federal courts before which the issue is pending appear to be

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71. Based on differing interpretations of the responsibilities imposed on Mr. Calvo in the Warehouse offering by applicable federal securities laws, all of which run counter to this Court's recent decision in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

doing the same.

A review of the Florida Supreme Court's decision by this Court is needed to clarify the applicable law and render it uniform throughout the federal system.

2. The Calvo Case raises critical constitutional issues involving the applicability of due process, equal protection and protection from *ex post facto* regulation of professional conduct. These include fundamental concepts such as the right to legal counsel, whether state regulators may wait indefinitely after authorizing a disciplinary proceeding before starting it and whether their failure to comply with statutorily established procedures for prosecution involves deprivation of due process and equal protection.[72] They also involve the issue of whether or not state regulatory authorities are required to equally apply judicially developed standards when making decisions in disciplinary matters.[73]

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72. The case will also permit the Court to address the question of whether or not the equal protection clause of the Fourteenth Amendment to the United States Constitution requires the states to honor the guarantees of their state constitutions in proceedings regulating state licensed professions.

The issues are especially important where it has become obvious that hispanics are subjected to illegal discrimination preventing them from advancing into leadership roles based on discriminatory enforcement of professional rules.

3. The rule of conduct on which the Florida Supreme Court based its decision was repealed without re-enactment and without a savings clause on December 31, 1987. Nonetheless, it was used in this proceeding, formally initiated during August of 1991. The rule, or variations thereof, was embodied in the codes regulating conduct of attorneys in most states and still survives in a number. Similar rules are used to regulate the conduct of other persons whose professions are reliant on government licenses. A decision on whether or not such rule is unconstitutionally vague will have national implications both within and outside the legal profession.[74]

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73. *E.g.*, on issues such as allocation of costs and application of equitable doctrines such as latches, waiver and estoppel.

74. In addition, the Court will be able to rule on the important technical issue of whether or not rules regulating conduct that have been repealed without re-enactment or a savings clause can continue to be

4. The Court will have the opportunity of addressing the issue of whether or not the introduction of final judgments as evidence of their findings of fact is constitutionally permissible in proceedings requiring higher standards of proof. While the issue has been decided in the area of criminal law, this Court should address it in a non-criminal law setting.[75]

5. The Court will be provided the opportunity to rule on two important federal questions, the status of attorneys representing underwriters as "experts" for purposes of defining their obligations and liabilities under federal securities law and their responsibility for inaccuracy of materials contained in registration statements, as well as their responsibility when facts change after counsel's participation; and, the Florida Supreme Court's opinion that

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enforced.

75. It will also have the opportunity of addressing the due process propriety of multiple hearsay as a predicate for decisions requiring proof by clear and convincing evidence.

attorneys in securities transactions are obligated to participate in the selling process. That is especially important since, in the past, this Court has carefully differentiated an attorney's liability based on whether he participated in selling activities.[76]

VI. ARGUMENT

DUE PROCESS

Disciplinary Rule 1-102(A)(6)

Statutes or rules that govern conduct must "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application."[77]

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76. The Court will also have the opportunity of applying its interpretation of Section 10(b) of the Securities Exchange Act of 1934, as amended, in Central Bank of Denver, N.A. v First Interstate Bank, *supra*, to areas beyond private litigation.

77. See Baggett v Bullitt, 377 U.S. 360 (1964); Keyishian v Board of Regents, 385 U.S. 589 (1967); Watkins v United States, 354 U.S. 178 (1957); Lovell v City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938), Thornhill V Alabama, 310 U.S. 88 (1940); Talley v California, 362 U.S. 60 (1960); Edwards v South Carolina, 372 U.S. 229 (1963); Cox v Louisiana, 379 U.S. 536 (1965); and, Brown v Louisiana, 383 U.S. 131 (1966).

This Court specifically addressed the issue in the context of regulation of the practice of law when it found much more specific regulations than those here involved too vague to meet constitutional requirements, lending themselves "to selective enforcement against unpopular causes," see NAACP v Button, 371 U.S. 415 (1963). The Florida Supreme Court has acknowledged such concept[78] but in this case, clearly ignored it.[79]

DR1-102(A)(6), provides that: "A lawyer shall not [e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other sections of DR1-102(A) but provides no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Florida Bar to disbar any attorneys it finds objectionable on any grounds

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78. See Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (Fla. 3rd DCA 1988).

79. Mr. Calvo first raised objections to the validity of DR 1-102(A)(6) in a motion to dismiss prior to the Final Hearing. He subsequently challenged such rule at the Final Hearing, in his Appeal Briefs and expanded on his objections to the validity of such rule in his Rehearing Motion.

imaginable. It is therefore constitutionally deficient and prosecution thereunder should not be permitted.[80]

DR 1-102(A)(6) was repealed without re-enactment by the Florida Supreme Court effective as of January 1, 1988, reflecting an acknowledgment that it was not an appropriate predicate for discipline.[81] Nonetheless, the Calvo Case stands for the proposition that repealed provisions not included in the re-enacted code continue as viable predicates for conduct prior to their repeal.[82] Provi-

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80. See, *accord*, Webb v Department of Professional Regulation, Board of Professional Engineers, 595 So.2d 1103 (Fla. 5th DCA 1992); and, Delk v Department of Professional Regulation, 595 So.2d 966 (Fla. 6th DCA 1992). See also D'Alemberte v Anderson, 349 So.2d 164 (Fla. 1977); and, State v Wershow, 343 So.2d 605 (Fla. 1977).

81. DR1-102(A)(6) was not included in the revised rules promulgated in 1987. However, the Florida Supreme Court refused to follow its prior rulings to the effect that repeal without a savings clause or substantial re-enactment of a rule regulating conduct renders it inapplicable, even in then pending cases. See Fort v Fort, 104 So.2d 69 (Fla. 1st DCA 1958); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964); and, State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959). Such refusal deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

82. Such decision constitutes a retroactive promulgation in violation of constitutional prohibitions against *ex post facto* laws, since the position of the Florida Bar prior to this case was clearly different. See Yaffee v International Co., 80 So.2d 910 (Fla., 1955) and see Flord v State, 129 So. 861 (Fla. 1930); Fort v Fort, *supra*.

sions virtually identical to those in DR 1-102(A)(6) exist in the rules regulating the practice of law and other professions in states other than Florida. Thus, despite its repeal in Florida, the rule and its relatives continue to be major factors in regulation of governmentally licensed professions. This Court should address the constitutional propriety of such regulation, in light of the manner in which it has been applied to Mr. Calvo in the Calvo Case, as well as the constitutional propriety of continuing to enforce rules governing conduct that have been repealed, without re-enactment and without a savings clause.

Assistance of Counsel

The exclusion of Mr. Calvo's attorney from the trial based on a motion by the Florida Bar claiming that it intended to call him as a rebuttal witness[83] violated Mr. Calvo's rights to due process guaranteed by the United States[84] and Florida[85] Constitutions.[86] Such exclusion was

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83. This issue was raised at the commencement of the Final Hearing, as well as in the Appeal Briefs and Rehearing Motion to the Florida Supreme Court.

84. See amendments Five, Six and Fourteen to the United States Constitution.

critically prejudicial to Mr. Calvo.[87]

During the Final Hearing the referee, based on the motion of Bar Counsel and over the strenuous objection of Mr. Calvo, excluded Mr. Calvo's trial attorney, G. Richard Chamberlin,[88] from participation or attendance at the

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85. Due process is guaranteed by Article One, Section Nine of the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Two and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (5th Cir. 1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (Fla. 1960). The guarantees provided in Section One, Article Sixteen, are available to respondents in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, 196 So. 487 (Fla. 1940).

86. The right to be represented by counsel in both civil and criminal proceedings is equated with due process, see Times Pub. Co. v Burke, 375 So.2d 297 (Fla. 1979). The guarantees provided in Section One, Article Sixteen, are available to Respondent's in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, *supra.*

87. Such prejudice was impliedly admitted in the Florida Bar's brief to the Florida Supreme Court, where it criticized Mr. Calvo's conduct of the hearing in not calling rebuttal witnesses or introducing exculpatory evidence.

88. The Court is asked to judicially note that Mr. Chamberlin acted as counsel in the oral argument of the Gallagher Appeal, represented the Gallagher's before the Commission, represented Mr. Calvo in the 2e Case, and consequently, was an expert in the Warehouse series of cases.

hearing.[89] Larry D. Houston, Esquire, another attorney who Mr. Chamberlin intended to use to assist with technical evidentiary issues, was forced to conduct the defense, without any continuance, despite the fact that he knew practically nothing about the case or applicable law, and had never had an opportunity to speak to the numerous witnesses arranged for the trial.[90] Consequently many

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89. Mr. Calvo pointed out that both Rule 4-3.7, subsections (1), (2) and (4) of the R.Reg.F.B. and Section 90.616(c) of the Florida Evidence Code permitted Mr. Chamberlin's continued participation, but was overruled.

90. The Florida Supreme Court was falsely led to believe by counsel to the Florida Bar during oral argument that Mr. Calvo was offered a choice by the referee in the Calvo Case to either use G. Richard Chamberlin, Esquire, as a witness or as his attorney, and that Mr. Calvo elected to use Mr. Chamberlin as a witness, although he was never called for such purpose. In fact, as demonstrated in a letter provided by Mr. Chamberlin to the Chief Justice immediately following the oral argument, Mr. Calvo, when faced with such election chose to use Mr. Chamberlin as his attorney; however, counsel to the Florida Bar indicated that he intended to call Mr. Chamberlin as a rebuttal witness, whereupon the referee disqualified Mr. Chamberlin and ordered him out of the room. A copy of Mr. Chamberlin's letter, together with the affidavits of Mr. Calvo and of Larry D. Houston, Esquire, which accompanied such letter were annexed as exhibit 1-A to Mr. calvo's Rehearing Motion.

The case of Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials. The court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process. The holding agrees with the holdings in Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405

rebuttal witnesses to Mr. Bremer's testimony (*e.g.*, Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer) were never called to testify.[91] In addition, being unprepared and unfamiliar with the applicable law, Mr. Houston failed to rebut the testimony of the Florida Bar's expert through use of the text of Commission Rule 436(e) or the Florida Bar's own materials from the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*.[92]

(Fla. 1981), although the Florida Supreme Court failed to abide therewith!

This Court is asked to note that Mr. Calvo's comments on page 8 of the record, lines 2 to 24 (copies of which were included in Mr. Chamberlin's letter to the Chief Justice), make it irrefutable that it was Florida Bar counsel's stated intention of calling Mr. Chamberlin, as a witness, not the non-existent election by Mr. Calvo to do so, that led to his disqualification.

91. Their examination, and an examination of the financial reports for Messrs. Jenkins, Baldrica and Scherer would have clearly demonstrated that Bremer's testimony that Mr. Calvo assisted or attempted to assist in locating loans to effect a fraudulent closing was totally false.

92. Mr. Chamberlin would have rebutted such testimony by merely pointing out that the identity of underwriter's counsel should have been proven by the Florida Bar through establishing the identity of the attorney who filed the request for acceleration with the Commission and who negotiated the terms of the underwriter's compensation with the NASD, in each case being the the Beer Firm. The Florida Bar could have obtained the copies of such correspondence easily (while Mr. Calvo could

Mr. Chamberlin was not a witness to any facts material to the proceeding nor did he have any knowledge thereof, except as obtained when acting as attorney for Mr. Calvo during the appeal of the injunction and the 2e proceeding, or to the Gallaghers, thus, he could not have provided any testimony at the Final Hearing unless Mr. Calvo and the Gallaghers waived their rights to attorney client privilege. Because they did not, there was no basis for the use of Mr. Chamberlin as a witness by the Florida Bar, and, in fact, the Florida Bar never called Mr. Chamberlin as a witness or even interviewed him with that possibility in mind.[93]

Mr. Calvo specified at the Final Hearing that Mr. Chamberlin was essential to the cross examination of Bremer.[94] Mr. Chamberlin intended to impeach Mr.

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not).

93. The referee made no inquiry as to what evidence Mr. Chamberlin was to provide on behalf of the Florida Bar.

94. See pages 7 and 8 of the record of the Final Hearing, copies of which were included in the appendix filed with the Reply Brief, and were also included as part of exhibit 1-A to his Rehearing Motion.

Bremer by introducing affidavits provided by Mr. Bremer to the Commission in the Injunction Action.[95] Indeed, in paragraph 52 of the First Bremer Affidavit, Bremer flatly admits[96] that Mr. Calvo believed that the purchase of stock by Bremer (as explained to Mr. Calvo) was unequivocably legal.

Mr. Calvo's rights to due process included the right to meaningful[97] representation by counsel. That right was

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95. With which Mr. Chamberlin, but not Mr. Houston, was totally familiar. Bremer provided the Commission with three separate affidavits for use in the Warehouse litigation; however, the Commission withheld the first affidavit provided by Bremer because it authenticated the Bremer tapes which the Commission wanted to exclude from consideration in conjunction with its motion for summary judgment. Bar Counsel in this proceeding also succeeded in excluding introduction of such transcripts when the Commission failed to provide them for the Final Hearing at the instruction of the Referee to Bar Counsel. The affidavits were included in the joint appendix filed by Mr. Calvo with the United States Court of Appeals for the Second Circuit in *Commission v Calvo*, 891 F.2d 457 (2d Cir. 1989), at pages A486 through A491 (the "Third Bremer Affidavit"), A685 through A713 (the "First Bremer Affidavit") and A714 through A727 (the "Second Bremer Affidavit"). Excerpts from such affidavits were included as exhibits to the Rehearing Motion. A review of such excerpts demonstrates material differences between them and between them and the testimony of Bremer at the Final Hearing to a degree that would have rendered Bremer totally incredible as a witness, and would have corroborated the bulk of Mr. Calvo's testimony.

96. Confirming the assertions in the Granai deposition that Mr. Calvo was certain that the Bremer stock purchase was legal, and, confirming Bremer's testimony at the Final Hearing that, at the closing, Mr. Calvo did not believe that anything improper was being undertaken.

violated in the Calvo Case.[98] This Court should address itself to the legal consequences of such violation.

Timely Notice; Timely Hearing

In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), this Court outlawed the replevin statutes of numerous states, including the State of Florida, because of their constitutionally inadequate notice and hearing provisions. This Court has held that the fundamental requirement of due process is opportunity to be heard at a meaningful time and in a meaningful manner,

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97. The right under the Florida Constitution to assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings, see Myles v State, 602 So.2d 1278 (Fla. 1992). The case of Traylor v State, 596 So.2d 957 (Fla. 1992) makes it clear that the evidence presented at the Final Hearing in violation of Mr. Calvo's right to representation by counsel is not competent evidence, and cannot be used to justify the Florida Supreme Court's decision in this action.

98. Mr. Calvo was also not represented by counsel at the grievance committee hearing because the Complainant refused to grant a short continuance permitting attendance by his attorney. The only continuance in this matter granted to Mr. Calvo was during the pendency of his successful appeal of the Referee's decision limiting issues at trial. All of Mr. Calvo's other requests for postponements, even in the interests of clients facing federal criminal proceedings were rejected, while postponements to meet the Complainant's vacation schedule were liberally granted.

see Matthews V Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976). The procedural rules for disciplinary proceedings as interpreted by the Florida Supreme Court, pay lip service to such requirements; however, such constitutional requirements are, in fact, absent therefrom.[99]

Mr. Calvo was never provided with notice of the filing of the complaint, the only notice being a 1988 notification that the matter was being referred to a grievance committee. Mr. Calvo was never provided with notice of the decision of the grievance committee and did not even hear of it until receipt of a complaint in this action during August of 1991.[100] The Florida Supreme Court refused to consider the multi-year lapse by the Florida Bar in filing the complaint after its purported authorization by the

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99. These issues were first raised in Mr. Calvo's answer to the Florida Bar's complaint, and revisited at the Final Hearing and in the Appeal Briefs and Rehearing Motion.

100. This despite the internal requirement elucidated by the Florida Supreme Court in Florida Bar v Randolph, 238 So.2d 635 (Fla. 1970), that disciplinary matters be resolved within six months after initiation of an investigation, and, the specific procedures established in current Rule 3-7.4(k) of the R.Reg.F.B., *to wit*: "If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding ...."

grievance committee[101] and ignored the legal consequences of the intervening notification to Mr. Calvo by the Florida Bar that he was, in fact, in good standing as a member thereof. Had Mr. Calvo been told that the grievance committee had recommended that he be disbarred[102] he would not have moved back to Florida and resumed his practice of law in Florida; rather, he would either have assumed an active role in the management of his family investments in North Carolina, or, returned to practice law in the State of New York.[103]

The correct consequences of unjustified delays in Bar proceedings were addressed by the Florida Supreme Court definitively in the cases of Florida Bar v Randolph, *supra.*; and, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978).[104] Based on the holdings in such cases, the Calvo

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101. No written grievance committee decision was ever provided to Mr. Calvo, and it is believed none was ever prepared.

102. He first learned of that recommendation during the Florida Bar's closing argument at the Final Hearing .

103. He certainly would not have abandoned the few remaining Warehouse records he had when he left North Carolina.

104. The Florida Supreme Court "*pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers*

Case should have been dismissed because of the unexcused prosecutorial delay in initiating the action, and because of applicability of the equitable doctrines of latches, waiver and estoppel.[105]

In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), the United States Supreme Court held that the constitutional right to due process requires proper notice and a timely hearing. In the Calvo Case, the Florida Bar's delays were neither explained nor justified.[106] Like the replevin statutes, Bar disciplinary rules must conform to constitutionally mandated standards.[107] Such stan-

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from unjust delays, might well supplant more formal judgment as a form of discipline. That is so even though the record shows that the conduct of the lawyer merits discipline. The refusal of the Florida Supreme Court to follow the standards it set deprived Mr. Calvo of his right to equal protection guaranteed by the Florida and United States Constitutions.

105. A detailed analysis of such cases is contained in the Reply Brief and Rehearing Motion.

106. The Florida Bar's response to such delays and its violations of Rule 3-7.4(k) of the R.Reg.F.B. which governed the procedure applicable in the Calvo Case, was that such rules of procedure were not "jurisdictional" and failure to comply therewith was of no consequence.

107. In the Calvo Case, the Florida Supreme Court should have, based on the criteria it established in the McCain Case, found the Florida Bar's action was barred as a result of its unreasonable delays. Failure to comply with its own criteria and to enforce the procedural obligations of Bar Counsel under Rule 3-7.4(k) of the R.Reg.F.B. deprived Mr. Calvo

dards were not met in the Calvo Case because the Florida Supreme Court took the position espoused by the Florida Bar that in attorney disciplinary cases, they are merely "voluntary" and non-jurisdictional. This Court should intercede to make it clear that due process is not a voluntary concept, and that no tribunal has jurisdiction to ignore it.

Discovery & Evidentiary Matters

The Florida Supreme Court is bound by the guarantees of due process and equal protection imposed by the Florida and United States Constitutions.[108] In that regard, Mr. Calvo was entitled, during the conduct of the Florida Bar proceeding, to a meaningful ability to defend himself.

Notwithstanding such rights, Mr. Calvo was deprived of his right to conduct meaningful discovery as a result of:

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of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

108. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (Fla. 3rd DCA 1984).

protective orders granted in favor of the Florida Bar; the refusal of the Commission to provide copies of required materials; and, the alleged loss by the Florida Bar of years worth of its files, including the materials provided by Mr. Calvo to the Florida Bar in conjunction with its investigation. He was deprived of his statutory right to have matters judicially noted under mandatory judicial notice provisions of Florida law,[109] and to introduce relevant, competent evidence (as a result of the refusal of the referee to take such notice or admit such evidence).[110] Among the excluded materials were the judicial record of proceedings in the Gallagher Appeal and reports of the American Bar Association and the Association of the Bar of the City of New York dealing with ethical obligations of attorneys in matters involving securities laws. He was deprived of his right to have inappropriate and prejudicial evidence excluded; *e.g.*, the Bremer hearsay testimony;[111] the er-

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109. See Section 90.203 of the Florida Evidence Code.

110. In Davis v United States, 415 F.Supp 1086 (D. Kan. 1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings, requiring the rejection of the factual findings. The case specifically deals with attorneys, at pages 1091 and 1092.

roneous testimony of the expert witness; and, the final judgments in the Prior Warehouse Actions (which involved lower standards of proof).[112]

In the Calvo Case, the Referee accepted the testimony of Mr. Bremer[113] to the effect that Mr. Granai had told him that Mr. Calvo had told him that Paul C. Jenkins, Robert Baldrica and James Scherer were heavy hitters whom Mr. Calvo would introduce for purposes of making loans to close the offering, and that Francesca Daniels had calculated the proper escrow period in Mr. Calvo's presence, and based thereon, made his findings of fact.

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111. In the McCain Case, the Florida Supreme Court upheld the referee's finding of fact that hearsay statements were not clear and convincing evidence, regardless of the unquestionable integrity of the witnesses.

112. All of the foregoing issues were raised by Mr. Calvo either prior to or at the Final Hearing and in the Appeal Briefs and Rehearing Motion. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law," Tumey v State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

113. Bremer, unlike Mr. Wright, the witness in the McCain Case, is a convicted felon and, as exposed by comparing the affidavits he provided to the Commission and the Bremer tapes, with his testimony, is utterly incredible, as a matter of law.

Clearly applying the McCain Case standards such findings of fact were unsupported by clear and convincing evidence, but rather by un-persuasive hearsay. The Referee also accepted the testimony of the Florida Bar's purported expert, who had no personal knowledge of the facts at issue, almost no experience in small public offerings, and a demonstrably erroneous grasp of the applicable law. Both the referee and the Florida Supreme Court based their findings of law on such "expert" testimony.

The factual findings in the Calvo Case were improperly influenced by the factual conclusions contained in the final judgments in the Prior Warehouse Cases. Copies of the final judgments were introduced at the hearing as evidence over Mr. Calvo's objections, despite the fact that the standard of proof in the Prior Warehouses Cases (a preponderance of the evidence) was less than the standard of proof in the Calvo Case (clear and convincing evidence). The Florida Supreme Court, contrary to its prior decisions on point[114] and decisions throughout the

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114. See Lawton v State, 13 So.2d 211 (Fla. 1943), The Florida Bar v Price, 478 So.2d 812 (Fla. 1985).

federal court system, held that their admission was appropriate and the different standards of proof affected only the weight of the evidence.[115]

In Holman v Washington, 364 F.2d 618 (5th Cir. 1967), the court dealt with use of prior evidence without a proper foundation. It held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as well as under the applicable state constitution. It indicated that a predicate to use of indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. Such holding should have prohibited consideration of Bremer's testimony about statements made by Granai concerning Mr. Calvo's statements concerning Messrs. Jenkins', Baldrica's and Scherer's statements; and, Bremer's statements concerning the statements made by Ms. Daniels, all of which have been denied by the purported declarants in sworn affidavits! It also should have prohibited the tes-

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115. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law," Tumey v State of Ohio, *supra*.

timony of the Florida Bar's purported expert.

The Florida Bar maintains that the practice of law is a privilege that it can regulate as it sees fit. That is not the law as expressed by courts throughout the federal system, and this Court should avail itself of this opportunity to correct the erroneous constitutional interpretation thereof by the Florida Supreme Court. In Harrell v Tobriner, 279 F.Supp 22 (D. D.C., 1967), the court made it clear that the practice of law is a right,[116] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience.

The ability of a person to obtain a fair hearing is more difficult in an administrative setting where the agency acts as prosecutor, judge and appellate body. In such cases the agency must carefully monitor its agents to assure that they respect constitutional guarantees. Mr. Calvo was entitled not to a mere hearing but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include the right to appropriate enforcement of discovery

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116. That is clearly the case under Section One, Article Two of the Florida Constitution, see State ex rel. Sbordy v Rowlett, 190 So.2d 59 (Fla. 1935).

rights,[117] to timely notice of accusations against him, to a timely hearing, to access to mandatory judicial notice as provided by statute,[118] to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially where competent evidence was readily available). Clearly the cases cited should have led the Florida Supreme Court to reject the Referee's findings of

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117. The referee refused to permit Mr. Calvo to propound more that 30 interrogatories to the Florida Bar, despite having been informed that the only discovery available to Mr. Calvo was through interrogatories, requests for admission and requests for production of documents. Instead, the referee issued a protective requiring the Florida Bar had to respond to only five of the interrogatories propounded. A review of such responses, as well as to the response to Mr. Calvo's request for admissions makes it clear that the Florida Bar refused to provide meaningful discovery. Instead it ignored large bodies of irrefutable evidence contradicting its position, and successfully objected to its introduction at the hearing (*e.g.*, the Gallagher Appeal). In addition to the formal restrictions imposed by the referee on the conduct of discovery by Mr. Calvo, he was deprived of access to most of his own records. He provided most of them to the Florida Bar during 1988 and such records were never returned. During 1990, in response to an inquiry from Mr. Calvo, the Florida Bar notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time the Florida Bar proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Commission, nor the Florida Bar were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, Florida Bar counsel admitted that several years worth of its files in the Calvo Case had disappeared.

118. See Section 90.203 of the Florida Evidence Code.

fact as clearly erroneous and unsupported by clear and convincing evidence. It did not do so because in proceedings involving attorney discipline, the Florida Supreme Court is not abiding by its constitutional responsibilities. Where a state court of last resort strays from the constitutional path, only this Court has the ability to force it back. This Court should involve itself in this case in order to take such corrective action.[119]

EQUAL PROTECTION:

The case of Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975), dealt with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. The court specifically found that states may not conserve or allocate a right to practice law;[120] and, that states cannot restrict practice of law in violation of rights to due process

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119. The essence of a procedural due process violation is the deprivation of a protected liberty or property interest without adequate safeguards. The interest may be one that is accorded by either state or federal law. See Johnson v Brelje D.C. 482 F.Supp. 125 (D. N.E Ill. 1979).

120. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

and equal protection under federal and state constitutions.[121]

The decision in the Calvo Case violated Mr. Calvo's right to equal protection in a number of ways, including assessment of costs;[122] failure to abide by decisions of the Florida Supreme Court setting standards for Florida Bar disciplinary proceedings; and, imposition of dispropor-

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121. "A State cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," Tyler v Vickery, *supra.*, at 1103.

122. The Florida Supreme Court assessed all of the Florida Bar's costs against Mr. Calvo, despite the fact that: (i) The Florida Bar's initial strategy of limiting issues at trial had been reversed by the Florida Supreme Court the previous year; (ii) The Florida Bar had been forced to drop a majority of the counts in its complaint against Mr. Calvo when it found that they had not, in fact, ever been authorized, and would have violated Mr. Calvo's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Florida Bar's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) The Florida Supreme Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2e proceeding.

The Florida Supreme Court established the factors for assessment of costs in a case cited by the Florida Bar itself, The Florida Bar v McCain, *supra*. Such factors should have led to a determination that, even if the Florida Bar was successful in its case, each party should have borne its own costs. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions.

tionate discipline on minority attorneys. The violation of equal protection involves the fact that Mr. Calvo's Colombian ancestry was made a finding of fact and was followed by prejudicial citation to decisions involving attorneys engaged in the narcotics trade, by Florida Bar counsel.[123]

The Issue of Costs

The Florida Supreme Court assessed all costs in the Calvo Case against Mr. Calvo,[124] despite the standards it established in The Florida Bar v McCain, *supra*. The action involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench. Addressing the issue of proper assessment of costs, the Florida Supreme Court held that where the Florida Bar takes an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint, each

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123. See, *e.g.*, The Florida Bar v Onett, 504 So.2d 388 (Fla. 1987) and The Florida Bar v Price, *supra*.

124. Costs were assessed based on post hearing *ex parte* communications between the referee and Florida Bar. Mr. Calvo raised issues concerning their impropriety in his Appeal Briefs and Rehearing Motion.

party should bear its own costs even if the Florida Bar is successful in securing a disbarrment.

In the Calvo Case the Florida Bar took an overbroad approach as a result of which it had to voluntarily dismiss a majority of the counts with which it had charged Mr. Calvo. It expounded a legal theory that resulted in one year of litigation, prior to its rejection through appeal to the Florida Supreme Court. Such overbreadth occasioned Mr. Calvo significant loss of scarce funds and time. Based on the McCain Case, the Florida Supreme Court should have reversed the Referee's assessments of costs.[125]

The Florida Supreme Court may not differentiate in the application of its criteria between minority attorneys and former Supreme Court members. To do so violates Mr. Calvo's right to equal protection guaranteed by the Florida and United States Constitutions.[126] It undoubtedly

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125. See, *e.g.*, The Florida Bar v Onett, *supra.*, and The Florida Bar v Price, *supra.*

126. See Truax v Corrigan, 257 U.S. 320, 42 S.Ct. 124, 66 L.Ed 254 (1921), where Chief Justice Taft observed, "Our whole system of law is predicated on the general fundamental principal of equality before the law .... The guarantee was aimed at undue favor and individual or class privilege on the one hand, and a hostile discrimination or the oppression of inequality on the other."

did so in this case and this Court should correct such proclivity.

Right to Non-arbitrary, Cruel or Unusual Punishment

The eighth amendment to the United States Constitution, as applied to the states by the 14th and 5th amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of the Calvo Case, when considered with the intervening punishment to which Mr. Calvo and his family have been subjected and the procedural irregularities associated with the Calvo Case, the disbarrment of Mr. Calvo is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992), cited by the Florida Bar.

The Neu Case held that in order to prove a violation of DR 1-102(A)(6), the Florida Bar had to establish the element of intent to engage in dishonesty, misrepresentation, deceit or fraud by clear and convincing evidence and

that discipline was to be based on a three purpose test.

At the final hearing, no evidence was introduced to indicate that Mr. Calvo intended to deceive anyone;[127] rather, Bremer, the Florida Bar's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing.[128] The referee's findings of fact concerning issues of Mr. Calvo's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by any evidence at all.[129]

With reference to discipline, the three fold test established in the Neu Case required the referee and the Florida Supreme Court to apply the following standards:

First, the discipline had to be fair to society, both in terms of protecting the public from unethical conduct, *and,*

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127. On the other hand, a large quantity of unrefuted evidence of Mr. Calvo's good moral character and integrity was introduced.

128. Testifying for the Florida Bar, Joseph Caruncho admitted that Mr. Calvo always insisted on complete disclosure and never countenanced wrongful conduct.

129. The fact that Mr. Calvo believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits, relevant portions of which were included as exhibits to the Rehearing Motion.

at the same time, not denying the public services of a qualified lawyer. Mr. Calvo is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Commission.[130] The two year suspension was served as a two year suspension from the practice of law. Furthermore, Mr. Calvo was at the time of his disbarrment the only hispanic or securities attorney in his geographic location. A great deal of his practice involving hispanic clientele was either *pro bono* or at greatly reduced rates subsidized by his out of state corporate clientele. While the Florida Bar has noted with concern the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the Calvo Case.

Second, the punishment must be fair, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the un-excused delays in bringing the Calvo Case and the

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130. No evidence was introduced of any other securities violations or of any material misconduct.

myriad procedural deficiencies and irregularities therewith. Obviously, the discipline recommended had no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. The injunction and 2e sanctions[131] provide more than adequate discipline to deter others.

An analysis of this decision and those of the Florida Supreme Court in the Randolph and McCain Cases, *supra.*, as well as an analysis of the punishment in many of the cases cited by the Florida Bar and reviewed in the Rehearing Motion, makes it clear that such disparity is evident in the instant proceedings.[132]

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131. As well as the absence of misconduct of any kind following such sanctions.

132. See, *e.g.*, The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992), one year suspension; The Florida Bar v Moxley, 462 So.2d 814 (Fla. 1985), 60 day suspension; The Florida Bar v Simons, 581 So.2d 154 (Fla. 1991), suspension for one year; The Florida Bar v Adler, 589 So.2d 899 (Fla. 1991); The Florida Bar v Trinkle, 580 So.2d 157 (Fla. 1991), public reprimand; The Florida Bar v Diamond, 548 So.2d 1107 (Fla. 1989), criminal conviction for mail and wire fraud; The Florida Bar v Levine, 571 So.2d 420 (Fla. 1990), criminal conviction for securities fraud, disbarrment related back to date of injunction, making defendant eligible for earlier re-admission; The Florida Bar v Winderman, 614 So.2d 484 (Fla. 1993), suspension reduced; and, The Florida Bar v Stalnaker, 485 So.2d 815 (Fla. 1986), suspension. All of these cases were cited by the Complainant.

Prejudice Based on National Origin[133]

The director of the Florida bar and the Florida Supreme Court have noted that minorities are disproportionately represented in the Florida Bar, especially in positions of leadership and responsibility. Records of results of disciplinary proceedings maintained by the Florida Bar demonstrate that minority attorneys are also disproportionately subjected to disciplinary proceedings and that the standards applied and discipline imposed are more harsh.[134]

The Referee in this matter made a factual finding that Mr. Calvo is Colombian. He did so because the Florida Bar have made an issue of such fact. The issue was compounded by citation to bar disciplinary actions with no relationship to the Calvo Case, but instead involving attorneys disciplined for engaging in narcotics trafficking.[135]

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133. The issue was raised in the Appeal Briefs and Rehearing Motion.

134. The Court is requested to judicially note the reports of attorney discipline published during 1993 in The Florida Bar News, an official publication of the Florida Bar.

135. See, *e.g.*, The Florida Bar v Onett, *supra.*, and The Florida Bar v Price, *supra.*

The implication was clear, *i.e.*, that he had never been accused of involvement with illegal drugs, as a Colombian, Mr. Calvo was a suspect character. It is intolerable that the Florida Bar used such element in its case and the Florida Supreme Court should not have aligned itself with such blatant impropriety! The intercession of this Court is required to correct such inappropriate official conduct.

EX POST FACTO LEGISLATION

The Florida Supreme Court's decision amounts to the promulgation of constitutionally impermissible *ex post facto* standards governing professional conduct.[136]

The Florida Supreme Court decision was based on an interpretation of securities laws totally contrary to that reflected in the Commission's own regulations, as well as in materials promulgated by the Florida Bar. The Florida Supreme Court determined that the expert witness' testimony introduced by the Florida Bar was proper and ac-

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136. Additional argument concerning *ex post facto* legislation by the Florida Supreme Court in this matter is contained in the discussion of the invalidity of DR 1-102(A)(6). The issue of *ex post facto* aspects of the Florida Supreme Court's decision was first raised by Mr. Calvo in his Rehearing Motion.

curate concerning Mr. Calvo's status as legal counsel to the "parties"[137] and as to the role of attorneys as "experts" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Commission under the Securities Act of 1933, as amended.

The Florida Supreme Court rejected the materials from other jurisdictions cited by Mr. Calvo to prove the contrary point, as well as Commission Rules 436(e)[138] and 478.[139] While Florida is free to create its own standards for the conduct of attorneys, whether or not in agreement with the standards of the Commission, the federal courts or

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137. Despite the fact that Bremer has consistently admitted that Mr. Calvo did not represent Warehouse, and that no testimony was introduced by either the underwriter or Mr. Calvo admitting that at the times in question, Mr. Calvo represented the underwriter. Indeed, that factual conclusion flies in the face of the retainer letter entered into by the Beer Firm replacing the Calvo Firm, introduced at the Final Hearing. See excerpts from Bremer affidavits discussed in the Rehearing Motion, and discussions of the replacement as counsel in the Appeal Briefs.

138. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

139. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein.

other states, the Florida Bar had itself indicated to the legal community in the State of Florida[140] that in the preparation of registration statements, attorneys were not to be deemed experts,[141] thus the Florida Supreme Court's retroactive change of interpretation involves the promulgation of constitutionally prohibited *ex post facto* regulation of professional conduct.

In addition to its attorney disciplinary role, the Florida Bar regulates the practice of law in the State of Florida by imposing educational standards and sponsoring seminars to meet such goals. At the very least, the Florida Bar must be held responsible for not misleading practitioners in such seminars so that in applying the laws as espoused, they become guilty of violating the rules governing the practice of law in the State of Florida.[142]

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140. In light of the mandatory education requirements imposed by the Florida Supreme Court and the fact that such information was provided by the Florida Bar at one of the seminars presented in conjunction therewith, it is manifestly unfair and a violation of due process to disbar an attorney for relying on the information so provided.

141. See the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

142. To hold otherwise is akin to authorizing constitutionally impermissible entrapment.

The testimony of the "expert" on which the Florida Supreme Court and the Referee relied is totally at odds with the position which the Florida Bar takes in conjunction with its role as educator of Florida attorneys. That is unequivocally demonstrated by the lecture outline for the Florida Bar's 1987 continuing legal education program.[143] This Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not a lawyer issues written opinions to be shown to third parties, but that even in such cases, an attorney's liability was not deemed to be as described by the Florida Bar's expert. It is further asked to note that in the Gallagher Appeal Case counsel to the Commission unequivocably stated that Mr. Calvo had provided neither oral nor written opinions in conjunction with the Warehouse closing.

If such materials do not reflect the actual state of the law in Florida, then the Florida Bar should have been estopped from bringing this action after having been responsible for so thoroughly confusing the understanding of the

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143. Entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

actual law. The retroactive application of such standards constitute constitutionally impermissible *ex post facto* legislation that this Court should correct.

FEDERAL QUESTIONS

The Florida Supreme Court has ruled that attorneys representing underwriters are, as a consequence of unidentified federal rules, "experts" for purposes of liability under the Securities Act of 1933, as amended. The Florida Supreme Court's decision is clearly contrary to all law on such point.[144] This Court needs to correct such erroneous legal conclusion regarding a uniquely federal question.

In addition, the Florida Supreme Court has ruled that attorneys representing underwriters in federally registered securities offerings are jointly responsible, with the issuer

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144. The Court is asked to note the following rules, regulations, and authoritative sources: SEC Rule 436(e), Item 228.509 of new regulation SB; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035, 1234 through 1242, and 1256; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119; *Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985*, pages 214 through 217; and, *Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 4-343, 4-344, 4-231 through 4-234.11.

and the underwriter, for sale of the offered securities. No authority was cited in support of such proposition.

This Court has been careful to differentiate the liability of securities attorneys, based on their voluntary participation in the securities selling process. In Pinter v Dahl, 108 S. Ct. 2063 (1988),[145] this Court ruled that the term "seller" did not include attorneys acting within the normal scope of rendering professional legal services.

In the very recent case of Central Bank of Denver, N.A. v First Interstate Bank, *supra.*, this Court found that the language of Section 10(b) of the Securities Exchange Act of 1934, as amended, did not cover aiding and abetting liability, the predicate for the Injunction Case on which the 2e decision was also based.

The decision of the Florida Supreme Court is at odds with this Court's interpretations of federal law in that context, and such misapprehension should be corrected.

VII. CONCLUSION

The underlying decision is ripe with timely, multi-

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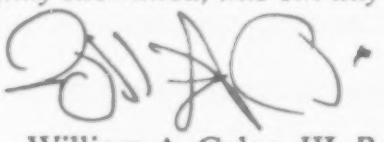
145. Interpreting Section 12 of the Securities Act of 1933, as amended.

circuit, issues of national importance involving due process, equal protection and interpretation of federal securities laws and regulations. Their resolution by this Court is required to clarify existing law and to provide constitutional guidance to agencies charged with regulating professional conduct. Their resolution is also required to correct *de facto* discrimination against hispanics which has and continues to prevent them from assuming their proper role in American society.

Respectfully submitted, this 8th day of May, 1994.



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Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States
October Term, 1994

William A. Calvo, III,
Petitioner
- against -
The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX VOLUME I

William A. Calvo, III, *Pro Se*
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Dated: May 8, 1994

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Denial of Motion for Rehearing By Florida Supreme Court

Supreme Court of Florida, Thursday, February 10, 1994

The Florida Bar v William A. Calvo, III, Case Number 78,395

Respondent's Motion and Memorandum of Law for Rehearing filed in the above cause is hereby denied. BARKETT, C.J., OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

Opinion & Judgment of the Florida Supreme Court

Supreme Court of Florida, Case Number 78,395

The Florida Bar v William A. Calvo, III

[December 16, 1993]

PER CURIAM.

We have for review the complaint of the Florida Bar and the referee's report recommending that William A. Calvo, III, a Florida attorney, be disbarred for alleged ethical violations.[1] We have jurisdiction. Art. V, 15, Fla.

Const.

In 1985, Calvo was working as counsel to persons in involved in sale of federally regulated securities, an area of law in which he possessed special expertise. Under applicable regulations, Calvo and his clients were required to sell a minimum of twelve million share within 150 days of the effective date of the prospectus, with a closing date no later than April 7, 1985. Failure to meet these requirements would mean that all monies paid by purchasers of the securities had to be returned.

It became apparent that the minimum number of shares would not be sold within the deadline. At this juncture, Calvo either became aware that his clients had arranged to obtain very short-term- "flash" loans or he participated in obtaining those loans. The loan proceeds then were used to create the appearance that the minimum number of shares were being sold. Those who loaned the money in turn were paid exorbitant fees, with

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1. We have previously have addressed a more limited question posed by this case. The Florida Bar v. Calvo, 601 Sc. 2d 1194 (Fla. 1992).

one man receiving a profit of $74,350 for the use of a quarter million dollars for a single day. The net result was that the corporation actually was capitalized at less than fifteen percent of the required amount.

In March 1985, prior to the closing date, one of the principals involved in the securities offer was indicated in Maryland for mail fraud. Under applicable regulations, this was information that Calvo and his clients had a duty to disclose to potential investors in the securities. Calvo and his clients failed to fulfill this obligation.

Closing did not actually occur until almost two weeks later than required, on April 22, 1985. The late closing occurred without the proper filing of notice or permission of the governing authorities, which Calvo knew or should have known was required by law.

Initially, we are unpersuaded by Calvo's contention that the referee erred in not permitting G. Richard Chamberlain to both act as Calvo's counsel and as a potential material witness in the proceeding below.[2] The

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2. We recognize, of course, that Chamberlain ultimately was not called as a witness because the strategy of the parties changed as the case progressed. Nevertheless, the fact that he was a potential witness

referee has substantial discretion in refusing to permit a witness to act as counsel, though there may be some circumstances in which the referee could abuse that discretion. We find no abuse of discretion here.

On the substantive issues, the referee's findings are supported by competent substantial evidence and must be accepted as fact by this Court. We reject Calvo's contention that the referee considered improper matters in reaching his conclusions, and especially Calvo's contention that the referee improperly took notice of the SEC and federal cases that arose out of the conduct in questions. See Securities & Exchange Comm'n v. Electronics Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988), aff'd sub nom. Securities & exchange Comm'n v. Calvo, 891 F. 2d 457 (2d Cir. 1989), cert. denied, 496 U.S. 942, 110 S Ct. 3228, 110 L. Ed. 2d 674 (1990); William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990).

We agree with Calvo that SEC disciplinary proceedings are subjected to a different standard of review than

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constituted sufficient grounds for the referee's ruling in light of the facts of this case.

are Bar discipline proceeding, but we find that this difference goes only to the weight to be accorded the information in a Florida disciplinary proceeding, not to its admissibility. We find no error in the way the referee admitted and considered this information, especially in light of the overwhelming case against Calvo in the SEC proceedings.

On the question of Calvo's alleged misconduct, we note the following findings of the United States District Court of Connecticut:

> Calvo's reckless conduct was a substantial factor in furthering the violations ... Calvo profited in that, by allowing the offering to close, his law firm received a $15,000 fee from the escrow funds which probably would not otherwise have been paid, a probability of which, by reason of the insufficient sale of stock, was all the more likely. The seriousness of the violations is reflected in {the corporation's} now defunct status and the investors' substantial losses, the result of the fraudulent offering.

18. The temporary receiver has recovered a portion

of the funds, but investors apparently will not be fully reimbursed. Electronics Warehouse, 689 F. Supp. at 69 & 69 n. 18 (citations omitted).

We also reject Calvo's contention that, because the misconduct was originated primarily by his clients, he was required to maintain confidentiality. Florida long has held that the rule of attorney-client is confidentiality comes to an end when an attorney knows that a client is engaged in crime or fraud; and as an experienced securities lawyer, Calvo certainly understood or should have understood the nature of his clients' activities here, see, e.g., Fla. Bar Code of Pro. Resp. D.R. 4-101 (D) (1985); R. Regulating Fla. Bar 4-1.6(b), which are detailed in the federal and SEC cases cited above.[3]

It is irrelevant whether or not the client subsequently is charged with a crime. Far too much criminal activity in today's society goes uncharged, and this fact alone does not excuse attorneys from failing to honor their obliga-

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3. We fully agree with the federal district court's assessment that Calvo's case acts or omission at a minimum constituted reckless misconduct.

tions to the public at large. It is especially incumbent upon attorneys to use their legal expertise to discourage rather than further the type of flagrant fraud on the public involved in this case.

We further reject Calvo's contention that he was denied due process rights and that he cannot be disciplined under the rules of ethics in effect in 1985, which have been superseded by the new Rules Regulating The Florida Bar. As with any rules of attorney discipline promulgated by this Court, the supersedure abrogated the former rules of discipline only as to matter arising after the effective date of the new rules; the earlier rules remain fully enforceable as to event before that date. We find no other error.[4]

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4. We reject Calvo's contention that the referee heard improper expert testimony on the duties of an underwriter's counsel; that the referee improperly considered Calvo's prior disciplinary record; that the referee report lacks factual or legal support; that Calvo was prejudiced by the delay between his misconduct and the present disciplinary proceeding,; and that the compliant against Calvo should be dismissed on technical grounds. On this last point, Calvo notes that the chair of the grievance committee neglected to sign the complaint, which the Bar concedes. However, any error was ministerial and harmless in light of the fact that the chair testified below that the chair testified below that the complaint accurately reflected the committee's findings.

Based on the referee's findings, we agree that disbarrment is appropriate here. In so concluding, we note in aggravation that Calvo previously has been privately reprimanded for minor misconduct. However, we are most influenced by the grave potential for harm that Calvo helped create for the investors who purchased securities based on his or his clients' serious misrepresentations or omissions. While the referee noted that these investors appear to have received some restitution,[5] that fact alone does not obviate a disbarrment. Restitution constitutes mitigating evidence, but it must be weighed against the aggravating evidence.

Here, we find the case severely aggravated, foremost by the great potential for harm to the public at large that Calvo helped create through his reckless misconduct or

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5. In this regard, the referee suggested that restitution may have "had something to do" with the escrow holder, Barnett Bank. The United States District Court of Connecticut, which examined Calvo's case, also concluded that only partial restitution had been made at the behest of the defunct corporation's receiver. Securities & Exchange Comm'n v. Electronics Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988), aff'd sub nom. Securities & Exchange Comm'n v. Calvo, 891 F. 2d 457 (2nd Cir. 1989), cert. denied, 496 U.S. 942, 110 S. Ct. 3228, 110 L. Ed. 2d 674 (1990).

omissions. We further find this case aggravated by Calvo's substantial experience in the field of securities law, which was his speciality before the SEC discipline imposed upon him; by the vulnerability of the potential victims involved here; by the dishonest and selfish motive; and by the continuing pattern of misconduct exhibited over the course of Calvo's activities in 1985. See Fla. Stds. Imposing Law. Sancs. 9.22. This was not a case of a single ethical lapse, but of an orchestrated and deliberated pattern of serious misconduct by act or omission.[6] The Standards provide in pertinent part:

> Disbarrment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Id. 5.11 (f). The Standards further provide:

> Disbarrment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty

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6. We specifically reject Calvo's contention that his misconduct was a momentary lapse. To the contrary, through act or omission he helped his clients perpetrate a serious fraud on the public over a period of several weeks.

owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Id. 7.1 "Conduct" for purposes of these rules can include deliberate omissions.[7]

We can conceive of few situations posing more serious harm to a large segment of the public than a fraudulent offering of securities. Such misconduct certainly is comparable to abuse of client trust funds, except that here the number of persons exposed to the risk of harm potentially was in the hundreds or thousands. Securities fraud of the type at issue here risks robbing many everyday citizens of their investments, their retirement savings, and their financial security. Calvo and his colleagues fraudulently sold securities that may have

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7. The standards are relevant here because they constitute a codification of the Bar and this Court's long-standing customary practices in determining the severity of discipline due. The standards are not ethical standards in themselves, but are mere procedural guides for referees, the Bar, and this Court to use. As such, they are relevant, though not necessarily binding, in all disciplinary cases, including those arising under earlier disciplinary codes.

been worthless from the moment they were purchased. This is misconduct of a most serious order.

For the foregoing reasons, we agree with the referee that Calvo violated Disciplinary Rules 1-102(A)(1) and 1-102 (A)(6) of the rules of discipline in effect at the times in question. Judgment for costs in the amount of $7,252.18 is hereby entered against Calvo and in favor of The Florida Bar, for which sum let execution issue. Calvo shall accept no new clients from the date this opinion is issued, and he is disbarred effective thirty days from the filing of this opinion so that Calvo can close out his practice and protect the interests of existing clients. If Calvo notifies this Court in writing that he is no longer practicing law and does not need the thirty days to protect existing clients, the Clerk of the Court is directed to enter an order making the disbarrment effective at that time.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

THE FILING OF A MOTION FOR REHEARING

SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARRMENT.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Stephen C. Whalen, Bar Counsel, Fort Lauderdale, Florida, for Complainant

William A. Calvo, III, pro se, of Houston, Calvo, & Houston, Belleview, Florida, for Respondent

Recommendation and Findings of Referee

Supreme Court of Florida, Before Raymond J. Hare, Referee; December 8, 1992; Supreme Court Case No. 78,395; The Florida Bar Case No. 87-21, 392 (17C).

The Florida Bar v William A. Calvo, III, Case Number 78,395

REPORT OF REFEREE

1. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein, a final

hearing was held on the following dates: September 14, 15, 16, 17 and 18th, 1992, in Fort Lauderdale, Florida.

All of the pleadings, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

Stephen C. Whalen, Esq. appeared as counsel for The Florida Bar and Larry D. Houston, Esq. appeared as counsel for the respondent.

After a finding of probable cause at the Grievance Committee level, a complaint was filed in The Supreme Court of Florida on August 9, 1991, alleging:

In Count I, that respondent knew, or was reckless in not knowing, that the offer period for the sale of securities of a corporation known as Electronics Warehouse to the public had expired, and that he allowed and participated in said closing on the sale approximately two weeks after said period had expired.

In Count II, that respondent allowed and participated in a scheme to obtain short term loans from several individuals who had no intent to buy any shares so that it would appear that the necessary funds to complete

the sale of shares had been obtained, and a closing could be held.

In Count III, that respondent and others misrepresented that the money paid in by subscribers of shares was to be refunded if twelve million shares were not sold and fully paid for within 150 days of the effective date of the Prospectus.

In Count IV, that respondent failed to disclose to investors that the principle shareholder, president and director of Electronics Warehouse was under indictment for mail fraud, and

In Count V, the Complaint realleged the allegations in the previous four counts and alleged that by reason of the foregoing that the respondent had committed ethical violations of the old Rules of Discipline, Rule 1-102(A) (1), and 1-102 (A) (6). Count V had originally charged violations of Rule 3-4.3, Rules of Discipline, and Rules 4-4.1 and 4-8.4 Rules of Professional Conduct but the complainant subsequently dismissed those particular allegations.

The Florida Bar presented evidence in support of its

complaint, and the respondent submitted evidence in his defense. Further, both parties presented evidence and argument concerning aggravating and mitigating factors to be considered in deciding what sanctions to impose, if any.

2. FINDINGS OF FACT AS TO EACH ITEM OF CONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After consideration of all the pleadings, exhibits and evidence before me, I find:

As to Count I - Extending the closing date

The respondent was acting at all times material to this allegation as attorney for the underwriter, Gallagher & Company, as well as acting at times as special counsel for Electronics Warehouse in the sale of the company's securities (complainant's exhibit G, letter dated April 22, 1985 from respondent to Barnett Bank of South Florida, N.A.). He knew that the underwriter and the president of the corporation were having a difficult time selling the shares, and that if a minimum of 12,000,000 shares were not sold and paid for within 150 days of the effective date

of the escrow agent, Barnett Bank. The closing date should have been April 7, 1985, but the closing was not held until April 22, 1985, approximately two weeks late. The investors were on notice that their money would be returned if the minimum number of shares were not sold by April, 1985, and it was not returned even though the minimum number of shares had not been sold by then. Respondent is and was at all times material an experienced securities attorney, and was well aware of the importance to investors of this time limit. No one had authority to extend this time except by a registration statement amendment.

Therefore, the respondent acted with reckless disregard for the safety of the investors' money when he authorized and participated in the closing as attorney for the underwriter approximately two weeks after the deadline.

As to Count II - Short term loans

It became apparent that the specified minimum number of shares would not be sold and paid for by the end of the offering period. Respondent knew that short term

loans had been arranged with several individuals who had no intention of purchasing stock. One was with Marvin T. Richmond, a complainant's witness, who lent $250,000 on the date of the closing. On the respondent's written authorization (complainant's exhibit G), the escrow agent was directed to pay Richmond out of the proceeds of the sale the sum of $324,350, giving Richmond a return of $74,350 for the use of his money for less than one day. Two other individual "investors" were likewise rewarded out of the funds paid to the trustee for Electronics Warehouse at the closing. The net result of this was that the company received, from the offering, approximately $130,000 and not the $964,000 specified in the Prospectus (complainant's exhibit L).

These loans did not constitute proceeds of bona fide sales of stock to public investors, but actually constituted a fraud on legitimate investors.

As to Count III - Manipulative or deceptive devices

Respondent, as underwriter's counsel was charged with seeing that the underwriter performed it's duties with due diligence. The underwriter delegates this due

diligence function to it's counsel (testimony of complainant's witness, James Beasley, Sr.). The Prospectus stated that respondent was counsel for the underwriter, and as such any information coming to his attention about the corporation or his connection with it must be passed on to the investors by way of post-effective amendments to the Prospectus. Respondent claims to have been replaced as underwriter's counsel and retained as special counsel for the company. If so, it was his duty to advise the company to file a post-effective amendment stating that he was no longer counsel for the underwriter. If the company did not do so it was then respondent's duty to notify the United States Securities & Exchange Commission. The underwriter, and especially counsel for the underwriter, have by law a great responsibility and potential liability. An attorney who came to believe he was no longer counsel for the underwriter should be quick to get out and relieve himself of that responsibility and potential liability.

Respondent fraudulently, with others, extended the offering period beyond the time specified. He, with

others, obtained short term loans which inflated the number of shares allegedly sold. The loans were then repaid almost instantaneously with huge profits to the lenders. Neither of these events were ever disclosed to the investors.

As to Count IV - Non-disclosure of Indictment

In March, 1985, prior to the closing on April 22, 1985, Edward W. Bremer, President, director and principle stockholder of Electronics Warehouse was indicted in Maryland on seventeen counts of mail fraud. Respondent and the underwriter were advised about it but failed and neglected to supply this information to investors. Respondent made no effort to check with the proper authorities to see whether or not the indictment had been dropped, which he claimed had been represented to him. It was not dropped and Bremer plead guilty to one count of mail fraud and was sentenced. Authorizing and participating in the closing without making this disclosure was reckless and a breach of respondent's duty to investors.

As to Count V - Ethical Violations

All of the facts stated above are applicable to the remaining allegations in Count V, to wit: "the respondent has violated Rule 1-102 (A) (1), 1-102 (A) (6), old Rules of Discipline."

DR 1-102 stated "(A) A lawyer shall not:

(1) Violate a disciplinary rule.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

3. RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

As to each count of the Complaint, I recommend that the respondent be found guilty of violating old Disciplinary Rule 1-102 (A) (6).

4. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that the respondent be disbarred from the practice of law in Florida.

5. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

After finding of guilty and prior to recommending

discipline to be recommended pursuant to Rule 3-7.6 (k) (1) (4), I considered the following personal history and prior disciplinary record of the respondent, as well as certain aggravating and mitigating circumstances, to wit:

A. Respondent was born in Columbia, S.A. on July 22, 1946, and graduated from The Citadel in 1968. He received his law degree from St. Johns University in 1976 and his LLM in 1977. Respondent was admitted to the Bar in New York in 1976 and to the Bar in Florida in 1980. The major part of his practice involved S.E.C. type work, representing underwriters. He was designated by the Florida Bar in corporate and securities law (see respondent's exhibit number 1, biog. summary).

B. Respondent's prior discipline imposed consisted of a private reprimand by The Florida Bar in May 1987 (see complainant's exhibit N), in which the Bar's complaint had charged that respondent made two improper disbursements from an escrow account entrusted to him, and, that his trust records were inadequate.

C. Factors considered to be aggravating:

1. The above set-forth prior discipline.
2. Respondent's dishonest and selfish motive.
3. Refusal to acknowledge wrongful nature of his conduct.
4. The vulnerability of the victims, the public investors.
5. Respondent's substantial experience in the practice of law, and in particular, the securities law.

D. Factors considered to be mitigating:

1. Delay in the disciplinary proceedings. However, respondent has substantially contributed to the delay and has not demonstrated specific prejudice resulting from the delay.
2. Apparently the investors received restitution. It was not fully described how this came about, but I believe the escrow holder, Barnett Bank, had something to do with it. The respondent returned the fee he had received, plus an additionai $10,000.
3. The respondent was suspended from practicing

before the S.E.C. for two years, and at least 85% of his practice had been before the S.E.C. This suspension destroyed his practice and he moved to North Carolina with his wife, after losing his house. He now practices law with Houston, Calvo & Houston, P.A. in Belleview, Florida.

6. STATEMENTS OF COSTS AND RECOMMENDATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	$ 500.00
Court Reporter:	
Attendance and transcript costs of Grievance Committee hearing	$ 519.75
Hearings before Referee and transcript costs	$ 576.71
9/8/92 hearing before Referee Attendance & transcript	$ 293.00
9/10/92 hearing before Referee Attendance & transcript	$ 148.54

Attendance at final hearing 9/14-18/92		$ 810.00
Costs of transcript		$2,972.75
		$5,320.75
Investigator cost		
(Service of process)		$ 23.25
Witness costs at trial		$ 437.50
Photocopying		$ 970.68
Total		$7,252.18

It is recommended that all costs and expenses be charged to the respondent.

Dated this 8th day of December, 1992, at Fort Lauderdale, Florida.

Reversal of Decision Limiting Issues at Trial

Opinion of the Florida Supreme Court

Supreme Court of Florida, Case Number 78,395

The Florida Bar v William A. Calvo, III

[July 2, 1992]

PER CURIAM.

William A. Calvo, III, seeks review of an order limit-

ing issues in this disciplinary proceeding to the appropriate discipline pursuant to rule 3-4.6 of the Rules Regulating The Florida Bar. We have jurisdiction. Art. V, 15, Fla. Const.

Disciplinary proceedings were instituted against Calvo after the Securities and Exchange Commission (SEC) issued an order and opinion suspending Calvo from appearing or practicing before the SEC for a period of two years. Prior to suspending Calvo, the SEC successfully sought a civil injunction in federal district court enjoining Calvo from violating various anti-fraud provisions of the federal securities laws.

We recently addressed the question of whether an order of suspension issued by the SEC is a final adjudication of discipline by a foreign jurisdiction under rule 3-4.6, holding that it is not. The Fla. Bar v. Tepps, No. 76,468 (Fla. May 28, 1992). Accordingly, we reject the referee's order limiting the issues in this proceeding and remand for a full evidentiary hearing.

It is so ordered.

BARKETT, C.J. and OVERTO, MCDONALD, SHAW,

GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Stephen C. Whalen, Bar Counsel, Fort Lauderdale, Florida, for Complainant

William A. Calvo, III, in pro se, Belleview, Florida, for Respondent

Constitutional, Statutory & Regulatory Provisions Involved

Constitutional Provisions

United States

Article One, Section Nine [3]: "No Bill of Att[a]
or ex post facto Law shall be passed.

Fifth Amendment to the Constitution: "No
shall be held to answer for a capital, or other

famous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed,

nor cruel and unusual punishment inflicted."

Fourteenth Amendment to the Constitution, Section 1: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the law."

Florida

Article One:

Section Two

Basic Rights.

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposi-

tion and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Section Nine

Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Section Sixteen (a)

Rights of accused ....

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge

venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Section Seventeen

Excessive punishments

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Regulatory Provisions

Securities and Exchange Commission Rules

Rule 436 Consents Required in Special Cases.

(a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall ex-

pressly state that the expert or counsel consents to such quotation or summarization.

(b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.

(c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information shall not be considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Act.

(d) The term "report on unaudited interim financial information" shall mean a report which consists of the following:

(1) A statement that the review of interim financial information was made in accordance with established professional standards for such reviews;

(2) An identification of the interim financial information reviewed;

(3) A description of the procedures for a review of interim financial information;

(4) A statement that a review of interim financial information is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is an expression of opinion regarding the financial statements taken as a whole, and, accordingly, no such opinion is expressed; and

(5) A statement about whether the accountant is aware of any material modifications that should be made to the accompanying financial information so that it conforms with generally accepted accounting principles.

(e) Where a counsel is named as having acted for the underwriters or selling security holders, no consent will be

required by reason of his being named as having acted in such capacity.

(f) Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished.

(g) (1) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization shall not be considered a part of a registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.

(2) For the purpose of paragraph (g)(1) of this section, the term "nationally recognized statistical rating organization" shall have the same meaning as used in Rule 15c3-1 (c)(2)(vi)(F) (17 CFR 240.15c3-1 (c)(2)(vi)(F)).

Rules Regulating Florida Bar

Former Disciplinary Rule 1-102. Misconduct:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Current Rule 3-7.4

(k) **Preparation, Forwarding, and Review of Grievance Committee Complaints.**

If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal com-

plaint. The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter; provided, however, that the committee may retire into private session to debate the issues involved and to reach a decision as to the action to be taken. The formal complaint shall be signed by the member of the committee who presided in the proceeding. The formal complaint shall be in such form as shall be prescribed by the board. If the presiding member of the grievance committee disagrees with the form of the complaint, the presiding member may direct bar counsel to make changes accordingly. If bar counsel does not agree with the changes, the matter shall be referred to the designated reviewer of the committee for appropriate action. When a formal complaint by a grievance committee is not referred to the designated reviewer, or returned to the grievance committee for further action, the formal complaint shall be promptly forwarded to and reviewed by bar headquarters

staff counsel who shall file the formal complaint, and furnish a copy of the formal complaint to the respondent. A copy of the record shall be made available to the respondent at the respondent's expense.

Current Rule 4-1.2

(c) **Limitation of Objectives of Representation.** A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) **Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[8]

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8. Comment: .... Criminal, fraudulent, and prohibited transaction: A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by rule 4-1 6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Current Rule 4-3.7 *Lawyer as Witness*

(a) **When Lawyer May Testify.**

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of for-

There is a critical distinction between presenting as analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

mality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

Florida Evidence Code

Section 90.203 Compulsory Judicial Notice Upon Request

A court shall take judicial notice of any matter in Section 90.202[9] when a party requests it and:

(1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.

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9. Section 90.202 involves matters which may be judicially noted, *e.g.*, paragraph six thereof states "Records of any court of this state or of any court of record of the United States or any state, territory, and jurisdiction of the United States.

(2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Section 90.616 Exclusion of Witnesses

(1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

(2) A witness may not be excluded if he is:

(a) A party who is a natural person.

(b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.

(c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.

(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful rep-

resentative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

Opinion in SEC 2(e) Proceeding

Administrative Proceeding File No. 3-7038; United States Securities and Exchange Commission; In the Matter of William A. Calvo, III; Initial Decision

Appearances: Benjamin Greenspoon, Richard M. Humes and John J. Nicholas, for the Commission's Division of Enforcement. G. Richard Chamberlin, for William A. Calvo, III.

Before: Max O. Regensteiner, Administrative Law Judge.

William A. Calvo, III ("Calvo" or "respondent") is an attorney licensed to practice in Florida and New York, who until recently practiced before the Commission. In an action brought by the Commission against him and others in the United States District Court for the District of Connecticut, the Court, in June 1988, granted the

Commission's motion for summary judgment against Calvo. It found that he had violated or aided and abetted violations of the antifraud provisions of Section 17 (a) of the Securities Act of 1933, Section 10 (b) and 15(c) of the Securities and Exchange Act of 1934 and Rules 10b-5, 10b-9 and 15c2-4 under that act in connection with a public offering of the stock of The Electronics Warehouse, Inc., ("Warehouse").[10] Based on these and certain additional findings, the Court permanently enjoined Calvo from violating the above provisions. Pursuant to Rule 2(e) (3) of its Rules of Practice, the Commission thereupon issued an Order temporarily suspending Calvo from appearing or practicing before the Commission. Subsequently, it denied Calvo's petition to lift the suspension and set the matter down for public hearings, to be followed by a determination of what, if any, sanction should be imposed on him.

Hearings were held at which Calvo was represented

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10. S.E.C. v. The Electronics Warehouse, Inc., et. al, 689 F. Supp. 53 Supp. 53 (D. Conn. 1988). Subsequent to the hearings herein, the Court denied a motion for reconsideration. Calvo has filed an Appeal for the Second Circuit, which is pending.

by counsel. The Division of Enforcement introduced the injunction and the Court's findings and certain other evidence; Calvo presented in his defense concerning the circumstances surrounding the Warehouse offering and his conduct in connection with it as character witnesses; and the Division presented further evidence by way of rebuttal.[11] Thereafter the parties filed proposed findings and supporting briefs, followed by reply briefs. To the extend my finding and conclusions reflect evidence presented before me, they are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses.[12]

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11. Subsequent to the close of the hearings, I received in evidence (1) the District Court's Ruling denying Calvo's motion for reconsideration and (2) the parties' briefs to the Second Circuit, together with appendices.

12. Calvo contends that the appropriate standard should be the higher clear and convincing evidence standard, citing S.E.C. v. National Student Marketing Corp.. 457 F. Supp. 682 (D.C. 1978). However, the language in that decision that he relies on lost its vitality when the Supreme Court, in Steadman v. S.E.C, 450 U.S. 91 (1981), held that the appropriate standard of proof in the Commission's administrative proceedings is the preponderance of the evidence standard. In William P. Carter, 47 S.E.C. 471,472 n. 3 (1981),the Commission stated that this was the standard applicable in Rule 2(e) proceedings.

The Respondent

Calvo received a J.D. degree in 1976 and an LLM in International Legal Studies in 1977. Most of his legal career has been spent in the private practice of corporate and Securities law. As noted, he is admitted to practice in Florida and New York.

The Warehouse Offering

Warehouse was founded in 1982 by one Edward Bremer, to engage in mail order marketing of electronic products. Bremer was its principal shareholder as well as president and a director. On November 8, 1984, the Commission declared effective a post effective amendment (Amendment No. 3) to a registration statement for Warehouse.[13] Under its terms, the underwriter, Gallagher & Co., was to use its best efforts to sell a maximum of 15 million at 10 cents a share on a "12 million share or none" basis within 90 days of the prospectus

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13. The registration statement had originally become effective in June 1984. However, the original underwriter was suspended from membership in the National Association of Securities Dealers during the offering period, requiring Warehouse to obtain a new underwriter and to postpone the offering.

date, or within 150 days if extended by agreement between the company and the underwriter. If 12 million shares were not sold and paid for within the offering period, all funds received from subscribers were to be returned to them. In the meantime, such funds were to be held in escrow by a bank. The prospectus stated that Warehouse was "completely dependent" on the personal efforts and abilities of Bremer, its chief executive officer, who would devote his entire time to its activities, and that the loss or unavailability of his services would have a materially adverse effect on Warehouse's business prospects and/or potential earning capacity. Calvo was named as counsel for the underwriter.[14]

The offering period was extended to 150 days, which meant that it expired on April 7, 1985. However, the offering was permitted to continue to April 22, when the closing took place. The proceeds were disbursed pursuant to Calvo's directions, including a $15,000 fee to

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14. The prospectus actually named Calvo and Bofshever. However, according to Calvo, this was not really a partnership, but simply an association.

Calvo and $ 324,350 to one Marvin Richmond. Not long thereafter, Warehouse went into receivership and, according to the Court, investors suffered substantial losses.

The Effect of the Court's Findings

A substantial part of the Division's proposed findings is predicated on the findings of the District Court. With minor exceptions, those proposed findings accurately reflect the Court's findings. Yet Calvo, disregarding their source, attacks many of them as distorted, misleading or unsupported by the record. This record approach reflects his contention that because the Court's decision is presently on appeal, it has no "res judicata, collateral estoppel or issue preclusive effect" in these proceedings and cannot be used to prove facts in dispute. (Reply brief, p. 33)

Rule 2(e) (3) provides that in a hearing such as the one held here, the petitioner (respondent) may not contest any finding made against him in the judicial proceeding on which the 2 (3) proceeding is predicated. This is, of course, consistent with general principles of collateral estoppel.[15] Calvo cites no authority in support of his ar-

gument that the pendency of an appeal compels a different result here. If fact, the law is to the contrary. In the D.C. Circuit's recent Blinder Robinson decision, which Calvo himself cites in support of other propositions, the Court stated that the fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation.[16]

The Court's Findings

Concluding that there was no genuine issue as to any material fact, the Court granted the Commission's motion for summary judgment against Calvo. The Commissions complaint had alleged that Calvo and other defen-

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15. See,e.g., Blinder Robinson & Co., Inc. v. S.E.C., 837 F.2d 1099, 1109 (D.C. Cir. 1988), cert. denied 109 S. Ct. 177.

16. Id. at 1104, n. 6. See Also Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court"); 1B J. Moore, Moore's Federal Practice, 10.416[3] ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel."); C.R. Richmond & Co., 46 S.E.C. 412, 414, n. 11 (1976).

dants, including Bremer, the Gallagher firm and Gary Granai, issuer's counsel, fraudulently extended the offering beyond specified in the prospectus; that they obtained short term loans so as to make it appear that the offering had been completed; that the loans were then repaid from the offering proceeds, a fact not disclosed in or contemplated by the prospectus; and that defendants failed to disclose that on March 8, 1985, Bremer was indicted by a federal grand jury on 17 counts of mail fraud. Calvo did not dispute the existence of the fraudulent schemes alleged, but claimed that there were issues of material fact as to whether he knowingly participated. The Court recognized that to find a violation (or aiding and abetting of a violation) of most of the designated sections required a finding of scienter. It held that reckless conduct satisfied the scienter requirement.

The Court's findings of fact and conclusions were as follows: As the termination date of the offering approached, sales of Warehouse stock were far below the 12 million share minimum. Bremer, Russell Gallagher (Gallagher & Co.'s owner) and Granai devised a scheme

to give the appearance that the minimum had been sold. Short term loans were obtained from three persons including Richmond, and the proceeds were wired into the escrow account on April 22, the day of the closing. The lenders had no intention of buying Warehouse stock. At Granai's instruction, Calvo prepared and delivered to the escrow bank a letter authorizing it to release the escrow funds by paying Richmond $324,350, Calvo $25,000 as his fee,[17] and other funds to Gallagher and to Granai as trustee for Warehouse. Of the latter funds, $480,000 was paid to the lenders other than Richmond. As a result, Warehouse received only about $130,000 from the offering, rather than the $964,000 that the prospectus specified it would receive if the 12 million shares were sold. While denying any knowledge of the loans other than Richmond's, Calvo admitted that he authorized the payment to Richmond and that Richmond indicated to him that he was writing money into the escrow account that was "going in with one hand and out with the other."

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17. Actually the amount to be paid, and in fact paid, to Calvo was $15,000.

Calvo claimed that he authorized the payment to Richmond because Granai told him that Richmond had bought an account receivable from Bremer, representing advertising and promotional expenses advance by Bremer on behalf of Warehouse. However, concluded the Court, Calvo had raised no issue of material fact with respect to his recklessness with respect to the Richmond payment. Calvo conceded that Richmond spoke to him to confirm that $324,350 would be paid to Richmond from the escrow account and that he told Calvo he was writing money into the escrow account. Based only on Granai's oral explanation that the payment was for an account payable, Calvo authorized release of nearly one-third of the offering proceeds to Richmond, an amount $74,350 in excess of Richmond's payment. Calvo made no injury as to why Richmond was wiring money to the escrow account, and not to Bremer from whom he was purportedly buying the account receivable, on the same day he was to receive payment of the account receivable, and he did not ask for documentation of the Bremer-Richmond or Bremer-Warehouse transactions.

Moreover, the Court found, nothing in the three post-effective amendments, which Calvo reviewed and for which he bore at least partial responsibility, or in the prospectus informed investors that Warehouse owned Bremer a large amount, that such an amount would be paid from the proceeds of the closing, or that Bremer's advertising agency had performed services for warehouse. Thus, the prospectus was materially misleading. And, assuming Calvo relied on Granai's explanation, it should have put him on notice that authorizing the payment to Richmond made the prospectus materially misleading and that the payment was part of a fraudulent device to close the offering. Releasing the funds in reliance on the information provided by Warehouse's counsel, without any investigation, constituted recklessness on Calvo's part. Moreover, even if he did not know the dubious, if not wrongful, basis for the transaction, he knew it was not disclosed. That knowledge and his failure to rectify the non-disclosure constituted recklessness as a matter of law.

The Court next turned to the fact that the offering

was permitted to continue beyond the 150-day period specified in the prospectus. It found as follows: Calvo reviewed Amendment No. 3 which stated that the offering period was to be measured form the date of the prospectus. Nina Gordon, an attorney employed by him was notified of the November 8 effective date by the Commission. The prospectus displayed this date on the first page. As underwriter's counsel, Calvo supplied and reviewed the escrow agreement form. Under that agreement, the offering period would be measured from the effective date. As a securities law specialist, Calvo was fully aware of the importance of the offering period limits as protection for investors. In February 1985, Calvo received a letter form the escrow bank setting a closing date of April 22, about two weeks beyond the offering period. He also knew the the funds were being deposited into the escrow account up to the morning of the closing. Despite this knowledge, he authorized the escrow bank to dispute the funds on April 22.

The Court went on as follows: Calvo's contentions that he did not know the effective date of the expiration

date of the offering, and that he relied on the bank's letter or that he had been replaced as the underwriter's counsel and had no reason to determine the proper closing date raised no genuine issue of fact with regard to his scienter in authorizing the extended closing. His actual knowledge of the effective date was irrelevant to whether his conduct was reckless. There was no need to determine whether notice to his associate charged him with constructive knowledge of the effective date. His failure to ascertain the correct effective date and hence the proper closing date was in reckless disregard of the truth or falsity of the prospectus' representation as to the offering period. Calvo's argument erroneously presumed that he had no obligation to assure that the offering adhered to the specified time limitation. He should have know that his April 22 letter would lead to what the most modest inquiry would have shown was an illegal and fraudulent closing.

With respect to nondisclosure of Bremer's indictment for mail fraud in March 1985, the Court's indictment the same month. Calvo considered the indictment a material

fact. He suggested to Granai that Bremer should resign and that a post-effective amendment would be filed. Calvo had a duty to investors to act, by causing sales to be suspended pending disclosure or the offering to be canceled. He did not do so. If fact, as Calvo knew before the closing, Bremer had not resigned and no amendment disclosing the indictment had been filed. Bremer pleaded guilty to one count of mail fraud in July 1985.

Calvo claimed that he was told by Granai that the indictment would be dropped, but he made no effort to verify that this had occurred. On April 22, 1985, the day of the closing, Granai gave Calvo a letter signed by Granai and addressed to Gallagher which stated in part that the registration and prospectus complied with applicable requirements and were accurate in all material respects, "except as may be required, if required at all, (as to which our firm expresses no opinion) by the recent proceeding brought against Mr. Bremer...." (emphasis added) Calvo was thus informed that the indictment had not been dropped. At best, Granai and Bremer expected that it would be dropped upon Bremer's agreement to

cooperate with the government, Calvo did not verify this information with Bremer's defense attorney or the U.S. Attorney. He insisted that Granai strike the underline portion of the letter and add the following: "It is our opinion, based upon our review of the proceeding and evidence to date that there is little likelihood that the government will prevail in this matter." After receiving the amended opinion letter, Calvo authorized the release of the funds.

The Court went on as follows: Calvo's argument that there was an issue of fact concerning the reasonableness of his conduct, in view of his claimed reliance on Granai's assurances that Bremer would resign and that the indictment would be dropped, is meritless. The indictment of Bremer, Warehouse's president and founder, was a material fact. The prospectus stated that Warehouse was completely dependent on Bremer's personal efforts and abilities and that his unavailability would have a materially adverse effect on the company. His indictment and its consequences were likely to make him unavailable. Moreover, it cast a cloud on the bona fides of

Warehouse, which was essentially his alter ego. Disclosure was required under SEC regulations.

Moreover, Granai's representation that the indictment would be dropped was only a prediction, which Calvo made no effort to verify. There is no issue of fact that, at the time the funds were released, Calvo knew of the indictment, that it had not been dismissed, and that it had not been disclosed in the prospectus. His conduct in authorizing the closing, absent such disclosure, was at least reckless.

If Calvo, as claimed, was not obliged to disclose Bremer's indictment to investors, he was obligated to prevent continued dissemination of misinformation. There is no factual support for his assertion that he was no longer underwriter's counsel at the time of the closing. Up to and at the closing he consulted with Granai and Bremer; acting on Gallagher's behalf, wrote the letter regarding release of funds from escrow; and reviewed the Granai opinion letter addressed to Gallagher and obtained changes in it. Even if Calvo's position as underwriter's counsel did not impose on him a duty of

disclosure or to rectify the misrepresentation, such a duty existed by virtue of his substantial participation in the offering. Thus, he prepared post-effective amendment No. 1 and reviewed amendments Nos. 2 and 3, and he authored the letter authorizing the release of funds from escrow. Moreover, he benefited from the closing by receiving his fee. In failing to disclose the indictment and allowing the offering to be closed without disclosure, Calvo violated his duty to investors, and his conduct was reckless as a matter of law.

The Court then proceeded to consider whether there was a reasonable likelihood of future violations, a necessary predicate for issuance of a permanent injunction. In concluding to issue an injunction, the Court made the following findings: Calvo's reckless conduct was a substantial factor in furthering the violations was reflected in Warehouse's defunct status and the investor's substantial losses. Calvo had not recognized the wrongfulness of his conduct, and lost no opportunity to blame others. He persisted in asserting the unfounded claim that he was removed as underwriter's counsel after amendment No.

3 was filed. There was no showing that Calvo had made any effort to help investors recoup their losses, and he only belatedly agreed to make restitution to the receiver. He had manifested no contribution and portrayed a callous indifference. As a securities attorney, Calvo had the opportunity to commit further violations. The sincerity of his assurances against future violations was problematic.

Contentions[18] of Parties and Findings

As noted, Calvo is not free in this forum to relitigate the Court's findings, including its conclusions regarding his violations.[19] Thus, his argument to the effort that while he "bears a portion of the causative responsibility" (Brief, p. 4), he was not culpable, is not entitled to con-

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18. I am appalled at several significant misstatements of the holdings of cases in the Division's brief. Most disturbing is the reliance on Lloyd Feld, 46 S.E.C. 103 (1975) (inappropriately cited in the brief only by administration proceeding file number) for the proposition that the Commission has "routinely permanently barred" attorneys for certain kinds of misconduct (p.17) In fact, Feld was censured. In a footnote on page 13 it is represented that Jo M. Ferguson was barred. In fact he, too, was censured. There simply can be no excuse for these and other misstatements. Moreover, they tend to cast doubt on the reliability of the Division's commissions in their entirety.

19. Of course, should the Court of Appeals overturn the District Court's decision, the predicate for this proceeding would be removed.

sideration. However, on the issue of what if any sanction is required in the public interest by virtue of the injunction and his violations, Calvo was and is free to present evidence and argument hearing on the degree of his culpability and the existence of mitigating factors.[20] Under Rule 2(e)(3), he has the burden of showing why he should not be sanctioned.

In urging that be not be disqualified from practicing before the commission, Calvo stresses that his involvement in the Warehouse offering was more limited that the normal involvement of underwriter's counsel and that he was not compensated in that role, and he asserts that prior to the closing, whatever involvement his firm had was almost entirely that of a young associate, Nina Gordon. He further asserts that he was led to believe that a t about the effective date of the post-effective amendment, another firm had actually replaced him as underwriter's counsel. With respect to the fact the the 150-day offering period was exceeded, Calvo claims that he was simply not

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20. See Blinder, Robinson Co., Inc. v. S.E.C., 837 F.2d at 1109,1110.

aware of this until long after the closing, that he relied on the escrow bank's notification of the offering's terminated of the offering's termination date and that, in view of his limited contact with the offering, he was justified in not making an independent calculation. With respect to the Bremer indictment, Calvo asserts that he was advised by Granai that it has been dropped, made some effort to confirm that information and pending receipt of written confirmation arranged for proceeds that were to go to the Warehouse to go instead into an escrow account (also referred to by Calvo as a trust account) in Granai's name. With respect to the payment of over $324,000 to Richmond at the closing, Calvo asserts that he was informed by Bremer and Granai that because of the delay in closing the offering, Bremer had advanced about $350,000 to Warehouse to be used for advertising and other expenditures of the nature described in the Use of Proceeds section of the prospectus, and that the resulting receivable was sold to Richmond. He further asserts that verification of these expenditures was to be provided in the Warehouse accountant's "cold comfort"

letter to be furnished before funds were released to Warehouse from Granai's escrow account.

Calvo also urges that the Warehouse matter was an unusual situation that will not be repeated; that, if permitted to resume his securities practice, he will revise the nature of that practice to preclude further problems; that he is well qualified to practice securities law and has good character and integrity; that he paid the receiver for Warehouse $25,000 in settlement, $10,00 more than the fee he had received; and that the Warehouse "fiasco" has already had a devastating impact on his life.

The Division, on the other hand, urges that Calvo be permanently barred from practicing before the Commission. It points to the Court's findings of serious securities law violations and contends that the evidence presented by Calvo, rather that mitigative in nature, only reaffim culpability. It asserts that reaffirms his culpability. It asserts that Calvo has failed to accept responsibility or show remorse, by maintaining he did nothing wrong, claiming that he was replaced as counsel for the underwriter and attempting t place the blame on junior as-

sociates. This attitude, it asserts, indicates that he would again commit violations if permitted to resume practice before the Commission.

At the outset, it should be noted that there is substance to Calvo's argument that the Warehouse offering, and his role in it, were somewhat out of the ordinary. When he came into the picture in the fall of 1984, there was already an effective registration statement; counsel for the original underwriter had done the usual due diligence work. Calvo was asked to draft a post-effective amendment involving only the designation of a substitute underwriter and a restructuring of the terms of the offering. This was not a function typically performed by counsel for the underwriter. And the fee which he was to receive was specifically for that assignment only. Admittedly, he also agreed at that time to represent the underwriter, and he was named as underwriter's counsel in the amended registration statement. Thereafter certain tasks normally performed by underwriter's counsel, involving clearance with the National Association of Securities Dealers ("NASD") and the blue sky work, were assigned

to another law firm.[21] Calvo was not paid a fee which he had asked for to serve as underwriter's counsel. I credit his testimony that he had little contact with the offering for of several months after the post-effective amendment became effective and that, in giving some advice to Gallagher, without charge, he considered that he was essentially seeking merely to cultivate a potential client. It is possible that for a time he actually believed, as he testified, that the other firm had replaced him as counsel for the underwriter. However, subsequent events must have brought home to him that the other principal actors still viewed him as having that status. And his own conduct was that of at least de facto underwriter's counsel with respect to matters other that NASD clearance and blue sky work.

Thus, in January 1985, Granai sent to Calvo draft copies of documents, including the "opinion letter" of issuer's counsel and the "old comfort" letter of the ac-

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21. The record shows that the other firm actually did blue sky work for Warehouse already in June 1984, well before Calvo even came into the picture. (See Resp. exhibit 25).

countant that were to be furnished to the underwriter at closing. At that time, according to Granai's covering letter (Resp. exhibit 18), a January 15 closing was contemplated. There is no suggestion anywhere in the record that Calvo returned the enclosures or told Granai that he had contacted the wrong person. In February, the escrow the offering's termination date. (Resp. exhibit 12) In March, as noted, Granai informed Calvo of Bremer's indictment and discussed the possible consequence with him. Calvo, in turn, discussed the matter with Gallagher. Calvo, in turn, discussed the matter with Gallagher. Calvo's name was never deleted from the Warehouse prospectus. In addition, there are the factors which led the Court to reject Calvo's argument that he was no longer underwriter's counsel at the time of the closing. Thus, Calvo met with Bremer, Granai and Gallagher in his office an April 19,1985, in preparation for the closing; was responsible for the change in the language regarding the Bremer indictment in Granai's letter to Gallagher; and signed the letter to the escrow bank that directed the manner in which the funds held in

escrow by the bank were to be disbursed. Moreover, Calvo attended the closing; the other firm which had supposedly replaced him was not represented. Notwithstanding his testimony that he attended the closing only to collect his fee for preparing the post effective amendment, it is clear that in these activities, Calvo was acting as counsel for the underwriter; his participation cannot be otherwise explained. Moreover, his letter to the escrow bank represented that "we represented Gallagher and Company, the underwriter. . ." Calvo attempt to explain away this language as indicating simply that he represented Gallagher, which happened to be the underwriter, and not that the Court's finding, not subject to challenge here, was that Calvo was still underwriter's counsel at the time of the closing.

There may be mitigating circumstances with respect to Calvo's misconduct involving the delayed closing. The Court did find that Calvo knew at the time that the offering continued beyond the 150-days period; it found that he was under a duty to know the correct termination date. Particularly in light of Calvo's somewhat limited

role in the offering, I credit his testimony that he did not know that date and that he relied on the escrow bank's computation.[22] However, neither that factor nor office practice of delegating detail work to junior associates can mitigate his conduct in relation to the payment of a major portion of the funds in the escrow account to Richmond and the nondisclosure of that payment or the Bremer indictment. Calvo himself was fully aware of these matters and was personally responsible for the manner in which they were handled.

With respect to the Bremer indictment, the Court's finding that Calvo made no effort to verify Granai's prediction that the indictment would be dropped is dispositive of that issue. Calvo now claims that on April 19 he asked an associate to make a telephone call to verify that the indictment had been dropped and was informed that it had been.[23] Aside from the fact that the associate flatly

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22. It appears that the escrow bank calculated the termination date from the date of the escrow agreement rather than the effective date of the post effective amendment.

23. In its Ruling on Calvo's motion for reconsideration, the Court noted certain disposition testimony, which was before the Court when it granted summary judgment, and an affidavit filed by Calvo with his

denied being given such an assignment, the claimed reliance on information obtained over the associate who had been hired only a week earlier and was not yet admitted to practice, would in itself have been reckless. Moreover, Granai's opinion letter, in both its original and revised forms, showed that the indictment had not been dropped. Calvo's argument that as a result of his advice the portion of the proceeds to be disbursed to Warehouse went into an escrow account in Granai's name pending receipt of written confirmation that the indictment had been dropped and receipt of certain other documents and information, is of no avail to Calvo. The account was not an escrow account, but simply a bank account in the name of Granai's firm as trustees, and there was no restriction on Granai's ability to disburse the funds.

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motion. In the deposition, he testified that he was told the indictment was going to be dropped. In the affidavit, on the other hand, he claimed that he had advised that the indictment had already been dropped and that an associate had verified this fact. At the hearings in this proceeding, Calvo initially testified that on April 19 Bremer said either that it had been dropped or that it was bending dropped (Tr. 196). A few minutes later he testified that he was told that the indictment "was dropped" (Tr. 202). On cross examination, he testified that his recollection was not clear whether he was told that the indictment was in the process of being dropped or had been dropped. (Tr. 296).

Calvo admittedly had no control over when or how the funds were disbursed. As noted, Granai promptly disbursed most of those funds to the other lenders.

In the Richmond situation, Calvo does not claim that he attempted to verify attempted to verify Bremer's alleged expenditures for projects described in the Use of Proceeds section of the prospectus or the nature of the arrangements between Bremer and Richmond. He again refers to the supposed "second escrow arrangement" (Brief, p. 17) as a vehicle to protect investors, in that no proceeds were to be disbursed to Warehouse until, among other things, the Bremer advances on behalf of the company could be verified.[24] As noted above, this was not really an escrow account. In any event, the payment whose propriety was to be substantiated had already been made at Calvo's direction. As pointed out by the Court in denying reconsideration, about half the proceeds were paid out at the closing (including about

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24. The Court, in denying the motion for reconsideration, noted that Calvo's "second escrow" theory was never alluded to before summary judgment.

one-third to Richmond) pursuant to the terms of Calvo's disbursement letter; under circumstances in which Calvo himself doubted the representations made to him about Richmond and the indictment.

Calvo's Constitutional Claims

Calvo's contends that it is an unconstitutional denial of due process for the injunction action and then to sit as judge and decide how severely he should be sanctioned for the conduct that additional arguments that Rule 2(e) exceeds the Commission's authority and, as applied here through the automatic suspension of Calvo's right to practice before the Commission, violates the 5th Amendment's due process provisions.[25] These or comparable arguments have previously been rejected by the Commission, either in this proceeding when it denied Calvo's motion to dismiss or in prior decisions,[26] and they

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25. Additional arguments that this proceeding also violates the 6th amendment's right to counsel and the 13th amendment's proscription of involuntary warrant further discussion.

26. See William R. Carter, 47 S.E.C. 471, 472 et seq. (1981) (reaffirming the Commission's authority to promulgate Rule 2(e)); Emanuel Fields, 45 S.E.C. 262,265-267 (rejecting contention that "ex parte temporary suspension order" on basis of injunction deprived attorney of due process).

are not open for e-examination by me.

Conclusion

In determining the sanction that is appropriate in the public interested, I have given no weight to the Division's argument that Calvo's continued insistence that he is not culpable signals a likelihood that the same or similar misconduct will recur. As I have repeatedly noted, for the purposes of this proceeding Calvo is bound by the District Court's findings, a fact which he has failed to recognize or acknowledge. However, Calvo is still litigating the injunction proceedings, as he has a perfect right to do, and, as the Court itself pointed out, he cannot be penalized for doing so. (Note 19 of the Court's decision)

The violations found by the Court were of a very serious nature. While Calvo points out that the Court did not find intentional or knowing misconduct on his part, damage to the investing public and the Commission processes can be equally great from reckless conduct. Calvo had a golden opportunity to put a halt to a fraudulent offering. He not only failed to do so, but by his action contributed to the implementation of the

Fraud. Nevertheless, I have determined that Calvo need not be permanently disqualified from practice before the Commission. Among other factors, it appears that he was deceived not only by Bremer, but Granai, a fellow attorney.[27] Despite his continued denial of culpability, I believe, based in part on observation of his demeanor, the testimony of certain of his witnesses, and the great impact on him of the injunction and administrative proceedings, that if permitted to resume practice before the Commission after a substantial period of suspension, he will be vigilant to avoid repetition of the type of misconduct that occurred here or similar misconduct. Everything considered, I conclude that a suspension totaling two years (including the almost 14 months for which he has already been suspend) is appropriate in the public interest.[28]

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27. Granai consented to permanent injunction in the Warehouse proceeding and thereafter, pursuant to an offer of settlement, was permanently disqualified from practice before the Commission. Securities Act Release No. 6762 (March 24, 1988).

28. All proposed finding and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.

Accordingly, IT IS ORDERED that William A. Calvo, III is hereby disqualified from appearing or practicing before the Commission until July 28, 1990.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice. Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to party, the initial decision shall not become final with respect to that party.

Respectfully submitted, this 8th day of May, 1994.

\s\William A. Calvo, III\s\

William A. Calvo, III, *Pro Se*

11355 Southeast 54th Avenue; Belleview, Florida 34420

(904) 245-4126

Supreme Court, U.S.
FILED

93179 MAY 6 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States
October Term, 1994

William A. Calvo, III,
Petitioner
- against -
The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX VOLUME II

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126

Dated: May 8, 1994

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Representative Materials From Pending Related Actions:

United States Court of Appeals for the 11th Circuit

In the United States Court of Appeals for the Eleventh Circuit; In the Matter of William A. Calvo, III; Misc. No. 94-1001.

Order of Disbarrment

It has been shown to the Court that the Supreme Court of the State of Florida has disbarred the above-named attorney from practice in that court. Pursuant to Rule 46-1(c)(4) of the Rules of the United States Court of Appeals for the Eleventh Circuit, it is ORDERED that said attorney be disbarred from practice in this court effective fourteen days after the date of this order unless this order is sooner modified or stayed.

IT IS FURTHER ORDERED by this Court that said attorney advise the clerk of the court of all pending appeals before this court in which he is the counsel of co-counsel of record.

This 5th day of January 1994.

Michael J. Cortez, Clerk

United States Court of Appeals for the 5th Circuit

United States Court of Appeals, Fifth Circuit, Office of the Court. Tel. 504-589-6514; 600 Camp Street; New Orleans, LA 70130.

Charles R. Fulbruge, III, Clerk

February 4, 1994

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr. William A. Calvo, III

Attorney at Law

P.O. Box 208

Belleview, Fl 34421-0208

Dear Mr. Calvo:

We have received notice from the Supreme Court of Florida that Mr. William A. Calvo, has been disbarred. Our roll of attorneys shows a William A. Calvo, II of Fort Lauderdale, Florida as being admitted to practice in this Court. On the assumption that you are the same per-

son, the enclosed Order to Show Cause is being issued. If this is incorrect, please advise this office so that corrective action can be taken.

Very Truly Yours,

CHARLES R. FULBRUGE,III,Clerk

By:_____

Karen J. Price, Chief

Administrative Support Div.

United States Court of Appeals, Fifth Circuit, Office of the Court. Tel. 504-589-6514; 600 Camp Street; New Orleans, LA 70130.

Charles R. Fulbruge, III, Clerk

March 1, 1994

Mr. William A. Calvo, III

Attorney at Law

P.O. Box 208

Belleview, Fl 34421-0208

Dear Mr. Calvo:

The Court advised me it will take no further action regarding your standing as a member of the Bar of this

Court pending the Supreme Court of the Unites States' action on your request they review your disbarrment by the Florida Supreme Court.

We request you keep up advised of the proceedings before the Supreme Court.

Very Truly Yours,

CHARLES R. FULBRUGE,III

Clerk

CRF:kjp

United States District Court for the Southern District of Florida

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

IN RE: William A. Calvo, III

_____:

ORDER TO SHOW CAUSE

An Order of Disbarrment, dated December 16, 1993, has been entered by the Supreme Court of Florida.

Pursuant to the Rules of Disciplinary Enforcement, United States District Court, Southern District of Florida, Rule 2(B), you are directed to file with this court, within 30 days after service of this Order to Show Cause, why the imposition of the identical discipline by the court would be unwarranted and the reasons therefore.

DONE AND ORDERED in chambers at Miami, Florida, this **15th** day of **March**, 1994.

/s/

C. CLYDE ATKINS

UNITED STATES DISTRICT JUDGE

Representative Response, Affidavit & Summary

The responses to the United States Courts of Appeals for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Florida, were virtually identical. For purposes of economy, only the Petitioner's response to the United States District

Court for the Southern District of Florida will be provided, unless other wise required by this Court:

Representative Response

The Honorable T.G. Chelotis

Clerk

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF FLORIDA

Federal Courthouse Square

301 North Miami Avenue

Miami, Florida 33128-7788

Re.: *In the Matter of William A. Calvo, III*

Dear Sir:

In response to the Order to Show Cause issued by the Honorable C. Clyde Atkins, United States District Judge, dated March 21, 1994, enclosed please find my required written response thereto, accompanied for purposes of support by copies of:

1. A copy of related correspondence from the United States Court of Appeals for the Fifth Circuit;
2. My Motion for Rehearing filed with the Florida Supreme Court on December 30, 1993, and denied

on February 10, 1994, together with an appurtenant appendix;

3. My brief appealing the decision of the referee filed with the Florida Supreme Court on April 16, 1993;
4. My reply brief appealing the decision of the referee filed with the Florida Supreme Court on May 11, 1993;
5. The decision of the Florida Supreme Court; and
6. The decision of Securities and Exchange Commission Administrative Law Judge Regensteiner in the related 2e proceeding.

I have also included a 46 page narrative with a covering affidavit which I believe the Court will find useful in analyzing the other materials provided.

Very truly yours,

William A. Calvo, III

In the United States District Court

For the Southern District of Florida

In the Matter of

William A. Calvo, III

No. 94-_____

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW WILLIAM A. CALVO, III, *Pro Se* (the "Respondent"), and, pursuant to the provisions of the Rules of this Court Governing Attorney Discipline, respectfully requests that this Court determine for itself, the Respondent's fitness to practice law before it, notwithstanding the current determination of the Supreme Court of the State of Florida (the "Florida Bar Case"). In this regard, the Court is informed that the Respondent will file a petition for writ of certiorari with the Supreme Court of the United States seeking review of the decision of the Florida Supreme Court.

Filed herewith in support of this Motion are a copy of the Respondent's motion to the Supreme Court of Florida requesting a rehearing (the "Denied Motion for Rehearing"), a copy of the Respondent's original brief to the Florida Supreme Court and a copy of the Respondent's original reply brief to the Florida Supreme Court.

As grounds in support of this Motion, the Respon-

dent states as follows:

A. The Respondent prays that this Court investigate the underlying matter and reach its own conclusions on the fitness of the Respondent to practice law in the United States District Court for the Southern District of Florida, and as grounds therefore, states as follows:

1. The Florida Supreme Court refused to consider the standards that govern practitioners of securities laws, as reflected in official resolutions of the American Bar Association and the Association of the Bar of the City of New York, which the Respondent followed.

2. The Florida Supreme Court refused to consider the Respondent's obligations and rights under the rules governing the New York Bar, of which he is a member, in conjunction with its disciplinary proceeding.

3. The Florida Proceeding was fundamentally lacking in due process, as described in the argument which follows, including, without

limitation, the facts that the Respondent was not provided with adequate notice, a timely hearing, right to counsel, right to discovery, right to introduce competent evidence, right to mandatory judicial notice, right to exclusion of incompetent and prejudicial evidence, all as guaranteed by the constitutions of the United States and the State of Florida.

4. That the decision of the Florida Supreme Court is not supported by the record.

B. Filed herewith in support of this Petition are:

1. The Respondent's certified narrative.
2. A copy of the Respondent's motion to the Supreme Court of Florida requesting a rehearing, denied on February 10, 1994 (the "Denied Motion for Rehearing").
3. A copy of the Respondent's briefs (original and reply) to the Florida Supreme Court.
4. A copy of the decision of the Florida Supreme Court in this matter.
5. A copy of the decision of the Securities and

Exchange Commission administrative law judge in the related 2e proceeding.

6. A copy of the determination by the United States Court of Appeals for the Fifth Circuit to defer consideration for discipline in this matter.

C. As grounds in support of this Petition, the Respondent states as follows:

A. PRIOR DETERMINATIONS OF OTHER COURTS

1. The United States Court of Appeals for the Eleventh Circuit has previously addressed the facts underlying the decision by the Florida Supreme Court, in the case of Gallagher & Co. v SEC; Appeal Number 91-5476, decided by the United States Court of Appeals for the Eleventh Circuit on May 5, 1992 (the "Gallagher Case").

2. During oral argument before the United States Court of Appeals for the Eleventh Circuit on the morning of April 21, 1992, counsel to the Securities and Exchange Commission unequivocally, in response to a direct question from the bench, stated

that William A. Calvo, III, had not provided either an oral or written opinion authorizing the closing which was the subject matter of that case (the "Warehouse Closing").[1]

3. The Warehouse Closing was also the subject matter of the Florida Bar Case, as well as of the two decisions (the "Prior Warehouse Actions") on which such Court almost exclusively relied in reaching its conclusions.[2] However, the Prior Warehouse Actions were based on a motion for summary judgment at which neither evidence nor testimony was considered, and, the factual basis therefore was contradicted by both the assertion of counsel to the Securities and Exchange Commission in the Gal-

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1. Such admission was diametrically opposed to the allegations of the Florida Bar in the Florida Bar Case, although the Florida Bar introduced no evidence in support thereof. Based on such focal factor, this Court is urged to acknowledge that the conclusions of the Florida Bar Case are not correct.

2. The two decisions being SEC v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988), hereinafter sometimes referred to as the "Injunction Action"; and, In re.; William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990) hereinafter sometimes referred to as the "2e Action".

lagher Case and almost all of the evidence at the hearing on the Florida Bar Case. Furthermore, the Florida Supreme Court ignored critical conclusions of the Securities and Exchange Commission judge who decided the 2e Action, *to wit*, that Mr. Calvo had been deceived by both Mr. Bremer and the Warehouse attorney, Mr. Granai, and that a permanent suspension was not warranted.[3]

4. The Florida Bar was successful in excluding evidence of the proceedings before the United States Court of Appeals for the Eleventh Circuit in the Gallagher Case during the hearing which resulted in the Florida Bar Case decision, thus, the admissions of the Securities and Exchange Commission which should have led to fundamentally different conclusions were not reflected in the decision.

5. The decision in the Injunction Action (almost seven

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3. This Court is urged to accept the reasoning of Judge Regensteiner in the 2e Action, and to note that the penalty imposed therein was completed more than three years ago.

years ago) was predicated on the assumption that the Respondent would continue to be permitted to practice law; and, the decision in the 2e Case[4] not only included the same assumption, but concluded, with reference to securities practice before the Securities and Exchange Commission, that the Respondent should be permitted to resume such practice on and after July of 1990, four years ago.[5]

6. It would be manifestly unfair and violative of the Respondent's rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States of America to disbar him from the United States District Court for the Southern District of Florida without opportunity for a hearing at which this matter could be considered.

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4. Where Judge Regensteiner not only noted prosecutorial improprieties, but that the Respondent had been deceived with reference to the facts on which he reached his informal conclusions.

5. In addition, the Court is asked to note that the United States Court of Appeals for the Second Circuit, of which the Respondent is a member, affirmed the decision in the injunction action in 1989, but did not find it appropriate to impose professional discipline on the Respondent.

B. CONSTITUTIONAL DEFICIENCIES IN THE FLORIDA BAR CASE

I. Introduction

1. The Respondent filed a motion for rehearing with the Florida Supreme Court in which he detailed numerous and egregious constitutional deficiencies in the proceedings underlying such decision. Additional constitutional deficiencies and arguments applicable to the Florida Supreme Court's decision in the Florida Bar Case are contained in the brief and reply brief filed by the Respondent with the Florida Supreme Court in the Florida Bar Case, and are supported by voluminous materials contained in a three volume appendix filed with the subject reply brief. The Respondent will also file a petition for certiorari with the United States Supreme Court.

2. Copies of the Denied Motion for Rehearing, the Respondent's original brief and the Respondent's reply brief filed in the Florida Bar Case have been filed in support of this Petition and the arguments

reflected therein are incorporated by reference hereto.[6]

3. The Denied Motion for Rehearing, brief and reply brief filed by the Respondent in the Florida Bar Case reflect the following constitutional deficiencies:

II. Deprivation of Right to Counsel

1. The exclusion of the Respondent's legal counsel from the trial based on a motion by the Florida Bar claiming that it intended to call such counsel as a rebuttal witness[7] violated the Respondent's rights to due process guaranteed by the United States[8] and

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6. The Denied Motion for Rehearing, brief, reply brief and appendix filed with the Florida Supreme Court should form a starting point for investigation of this matter by a master or a grievance committee appointed by this Court. Such investigative body should then verify the information reflected in the affidavits of Ms. Francesca Daniels and Messrs. Paul C. Jenkins, Bobby Baldrica and James Scherer, which the Florida Supreme Court rejected as untimely, the two previously provided Bremer affidavits, which the Florida Supreme Court refused to consider as untimely provided, the Bremer tapes, which the Securities and Exchange Commission failed to provide; and, the Warehouse correspondence records of the Securities and Exchange Commission and National Association of Securities Dealers, Inc., which have never been provided.

7. Which it failed to do and never even discussed with such counsel.

Florida[9] Constitutions. Such exclusion, as detailed in the Respondent's Denied Motion for Rehearing, brief and reply brief filed with the Florida Supreme Court, were critically prejudicial to the Respondent.[10]

2. It is incontestable that during the trial of the Florida Bar Case, the referee, based on the motion

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8. See amendments Five, Six and Fourteen to the United States Constitution.

9. Due process is guaranteed by Section One, Article Nine of the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Nine and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see **Collingsworth v Mayo**, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see **Cash v Culver**, 120 So.2d 590 (1960). The guarantees provided in Section One, Article Sixteen, are available to respondents in Florida Bar disciplinary proceedings, see, *e.g.*, **Weathers v Davis**, 196 So. 487 (1940).

10. Such prejudice was impliedly admitted in the Florida Bar's brief to the Supreme Court, where it criticized the Respondent's conduct of the hearing in not calling rebuttal witnesses or introducing exculpatory evidence.

of Bar Counsel and over the strenuous objection of Mr. Calvo, excluded Mr. Calvo's trial attorney, G. Richard Chamberlin,[11] from participation or attendance at the hearing. Larry D. Houston, Esquire, another attorney who Mr. Chamberlin intended to use to assist with technical evidentiary issues, was forced to conduct the defense, without any continuance, despite the fact that he knew practically nothing about the case or applicable law, and had never had an opportunity to speak to the numerous witnesses arranged for the trial.

3. The Florida Supreme Court was falsely led to believe by counsel to the Florida Bar during oral argument that Mr. Calvo was offered a choice by the referee in the Florida Bar Case to either use G. Richard Chamberlin, Esquire, as a witness or as his attorney, and that Mr. Calvo elected to use Mr.

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11. The Court is asked to judicially note that Mr. Chamberlin acted as counsel in the oral argument of the Gallagher Case, represented the Gallagher's before the Securities and Exchange Commission, represented the Respondent in the 2e Case, and consequently, was an expert in the Warehouse case.

Chamberlin as a witness, although he was never called for such purpose. In fact, as demonstrated in the letter provided by Mr. Chamberlin to the Chief Justice immediately following the oral argument, Mr. Calvo, when faced with such election chose to use Mr. Chamberlin as his attorney; however, counsel to the Florida Bar indicated that he intended to call Mr. Chamberlin as a rebuttal witness, whereupon the referee disqualified Mr. Chamberlin and ordered him out of the room. A copy of Mr. Chamberlin's letter, together with the affidavits of Mr. Calvo and of Larry D. Houston, Esquire, which accompanied such letter are annexed as exhibit 1-A to the Denied Motion for Rehearing filed in support of this Petition.[12]

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12. This Court is asked to note that Mr. Calvo's comments on page 8 of the record, lines 2 to 24 (copies of which are included in his letter to the Chief Justice), make it irrefutable that it was Mr. Whalen's stated intention of calling Mr. Chamberlin, as a witness, not the non-existent election by Mr. Calvo to do so, that led to his disqualification. It is also asked to note that the fact that Mr. Calvo had formally and on a timely basis, prior to the hearing, advised the referee and Bar counsel that he intended to call Mr. Whalen as a witness, did not impact the ability of the Florida Bar's counsel to participate in the proceeding.

4. Mr. Chamberlin was not a witness to any facts material to the proceeding nor did he have any knowledge thereof, except as obtained when acting as legal counsel to either Mr. Calvo during the appeal of the injunction and the 2e proceeding, or to the Gallaghers, thus, he could not have provided any testimony at the Final Hearing unless Mr. Calvo and the Gallaghers waived their rights to attorney client privilege. Because they did not, there was no basis for the use of Mr. Chamberlin as a witness by the Florida Bar, and, in fact, the Florida Bar never called Mr. Chamberlin as a witness or even interviewed him with that possibility in mind.[13]

5. Mr. Calvo was severely prejudiced by his inability to use Mr. Chamberlin's services, specifically, in that he was left with Larry D. Houston, who had never interviewed any witnesses and was unfamiliar with the facts or law involved,[14] to conduct his defense.

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13. The referee made no inquiry as to what evidence Mr. Chamberlin was to provide on behalf of the Florida Bar.

14. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special inter-

Consequently many rebuttal witnesses to Mr. Bremer's testimony (*e.g.*, Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer) were never called to testify. Their examination, and an examination of the financial reports for Messrs. Jenkins, Baldrica and Scherer would have clearly demonstrated that Bremer's testimony that Mr. Calvo assisted or attempted to assist in locating loans to effect a fraudulent closing was totally false. In addition, being unprepared and unfamiliar with the applicable law, Mr. Houston failed to rebut the testimony of the Florida Bar's expert through use of the text of Securities and Exchange Commission rules 436(e) or 478, or the Florida Bar's own materials from the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate*

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ests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (1960).

Directors, Officers and Attorneys.

6. Mr. Calvo specified at the Final Hearing that Mr. Chamberlin was essential to the cross examination of Bremer.[15] Had Mr. Chamberlin been permitted to act as counsel to Mr. Calvo, he would have, on cross examination of Mr. Bremer, introduced the affidavits filed by Mr. Bremer in the injunction action against Mr. Calvo.[16] Bremer provided the Securities and Exchange Commission with three separate affidavits for use in the Warehouse litigation; however, the Securities and Exchange Commission withheld the first affidavit provided by Bremer because it authenticated the Bremer tapes which the Securities and Exchange Commission wanted to exclude from consideration in conjunction with its motion for summary judgment.[17] The

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15. See pages 7 and 8 of the record of the Final Hearing, copies of which are included in the appendix filed by Mr. Calvo with his reply brief, and are also included as part of exhibit 1-A to the Denied Motion for Rehearing.

16. With which Mr. Chamberlin, but not Mr. Houston, was totally familiar.

affidavits were included in the joint appendix filed by Mr. Calvo with the United States Court of Appeals for the Second Circuit in *Securities and Exchange Commission v Calvo*, 891 F.2d 457 (2d Cir. 1989), at pages A486 through A491 (the "Third Bremer Affidavit"), A685 through A713 (the "First Bremer Affidavit") and A714 through A727 (the "Second Bremer Affidavit").

7. Excerpts from such joint appendix are included as composite exhibit 1-B to the Denied Motion for Rehearing, a copy of which has been filed in support of this Petition. A review of such excerpts demonstrates material differences between them and between them and the testimony of Bremer at the Final Hearing. For illustrative purposes:

   (a) Paragraph 6 of the Second Bremer Affidavit and Paragraph 16 of the First Bremer Affidavit admit that Mr. Calvo was only involved

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17. As did Bar Counsel in the Florida Bar Case. Those are the same transcripts that the Securities and Exchange Commission was supposed to deliver through Bar Counsel for the hearing, at the instruction of the referee to Bar Counsel, but failed to provide.

with post effective amendment number one to the Warehouse registration statement.[18]

(b) Paragraph 16 of the First Bremer Affidavit admits that Mr. Calvo was never counsel to Warehouse.[19]

(c) Paragraphs 24 and 25 of the First Bremer Affidavit authenticate the Bremer Tapes.

(d) Paragraphs 32, 33 and 34 of the First Bremer Affidavit and paragraphs 15 and 16 of the Second Bremer Affidavit concerning knowledge of the correct closing date were totally contradicted by Bremer's testimony at the Final Hearing where he first claimed no one knew about the erroneous closing date, and then, when cross examined as to his discussion of the proper closing date with

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18. There were three subsequent post effective amendments filed with which Mr. Calvo was not involved. The last such post effective amendment was the one declared effective.

19. The Florida Supreme Court found, without support in the record other than the erroneous testimony of the Florida Bar's expert (see Securities and Exchange Commission rules 436(e) and 478), that Mr. Calvo represented all of the parties.

Manuel Crespo of the Securities and Exchange Commission (and shown his taped transcript of the call), changed his story to indicate that Francesca Daniels had calculated the proper closing date in Mr. Calvo's presence. See the affidavit of Ms. Daniels denying Mr. Bremer's claim filed with the Florida Supreme Court as part of the appendix to Mr. Calvo's reply brief.

(e) Paragraphs 38 through 42 of the First Bremer Affidavit and paragraphs 21 and 22 of the Second Bremer Affidavit discuss Mr. Calvo's purported role in assisting Bremer to raise emergency loan funds through Messrs. Jordan and Burckhardt and Ms. Daniels, starting in January of 1985, indicating that Mr. Calvo had suggested such loans.[20] At the Final Hearing, Bremer admitted that Messrs. Jordan and Burckhardt and Ms. Daniels had been intro-

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20. Such claims were denied by Messrs. Jordan and Burckhardt and Ms. Daniels in affidavits filed in the Injunction Action.

duced solely in conjunction with solicitation of legitimate broker dealer participants in the offering (as contrasted with his claims in paragraphs 40 and 42 of the First Bremer Affidavit), and further, that Bremer conceived of the loan plan himself, and, never discussed it with Mr. Calvo, rather, he claimed that his attorney, Granai explained the proposed Bremer stock purchases to Mr. Calvo on April 19, 1985.[21]

(f) In paragraph 55 of the First Bremer Affidavit and paragraph 29 of the Second Bremer Affidavit, Bremer discusses the Rolands lunch with no mention of Paul C. Jenkins having been introduced by Mr. Calvo as a potential lender. He also admits that Mr. Calvo was accompanied by Nina Gordon, an attorney

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21. Excerpts from the testimony of Mr. Granai to the Securities and Exchange Commission read into the record of the Florida Bar Case make it clear that the scenario described by Mr. Granai to Mr. Calvo differed drastically from that described by Bremer, see Mr. Calvo's brief to the Florida Supreme Court filed in support of this Petition.

employed by Mr. Calvo.

(g) In paragraph 32 of the Second Bremer Affidavit, Bremer claims that he met with Mr. Calvo during the afternoon of April 19, 1985, after lunch, however, at the Final Hearing he admitted that Mr. Calvo had to leave lunch early because of appointments, and that he did not see Mr. Calvo again until running into him at Shooters. No such meeting was reflected in the First Bremer Affidavit.

(h) In paragraph 31 of the Second Bremer Affidavit, Bremer admits that Richmond contacted the escrow agent directly on Friday, April 19, 1985, to confirm his receipt of funds from escrow, three days prior to delivery of Mr. Calvo's letter of disbursal instructions.

(i) In paragraph 46 of the First Bremer Affidavit, Bremer discusses the incident with Kolonosky at the closing, which he could not recall at the Final Hearing.[22]

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22. That incident's sole purpose was to make Mr. Calvo believe

(j) In paragraph 51 of the First Bremer Affidavit, Bremer admits that he and Granai flew to Florida on April 18, 1985, rather than earlier as testified to at the Final Hearing. In that paragraph he also admitted that there was a discussion of meeting use of proceeds requirements at an April 19, 1985 meeting in Mr. Calvo's offices (although he, unlike Mr. Calvo, Granai and Gallagher, claimed such discussion was for deception purposes),[23] a discussion he flatly denied at the Final Hearing.

(k) In both the First Bremer Affidavit and the Second Bremer Affidavit, Bremer on several occasions reflects meetings with Beer,[24] who

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that the Warehouse offering was oversubscribed, and thus not to question the Bremer stock purchase. Had the Kolonosky stock purchase been accepted, then, as far as Mr. Calvo knew, the minimum offering would have been exceeded excluding Bremer's stock purchase.

23. Since the story appears to have been told only to Messrs. Calvo and Gallagher, they had to have been the targets of that deception.

24. The attorney who as of the September 24, 1984 retainer letter with Bremer, replaced Mr. Calvo's firm in the Warehouse offering. An investigation of the Warehouse matter examining correspondence from the Beer firm to the National Association of Securities Dealers, Inc., and Securities and Exchange Commission, on behalf of the un-

he claimed acted as "blue sky counsel" in the Warehouse offering. The Bremer tapes disclose that Beers' partner Wilkes was informed by Granai in early May of 1985 that the offering closed short, however, in paragraphs 75 and 76 of the First Bremer Affidavit, Bremer claims that Beer was shocked to discover such fact during a June 13, 1985 meeting, immediately after which he retained attorney Kaplan and, together with Beer, contacted the Justice Department and Securities and Exchange Commission.

(l) In paragraph 79 of the First Bremer Affidavit, Bremer claims that Mr. Calvo was told about his indictment but was unconcerned (he also testified to that effect at the Final Hearing);[25] *however, in paragraph 47 of the Second Bremer*

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derwriter, would make his role obvious.

25. That was clearly the conclusion of the Florida Supreme Court in the Florida Bar Case.

Affidavit, Bremer swore that Mr. Calvo "had expressed the opinion that a post effective amendment should be filed disclosing my [Bremer's] indictment, and that I [Bremer] should resign from Warehouse." Furthermore, in paragraph 48 of the Second Bremer Affidavit, Bremer admits that he agreed to resign.

8. Such drastic differences as to material facts make it clear that Bremer lied on numerous occasions, and that when considered with the consistency of Mr. Calvo's testimony and the prior testimony of the Gallaghers and Granai, and, the affidavits of Messrs. Jordan, Burckhardt, Jenkins, Baldrica, Scherer and, on two occasions, Ms. Daniels, Mr. Calvo's version of the events is the most credible.[26]

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26. If Mr. Calvo had been a participant in the Bremer conspiracy, he certainly would not have objected to the exclusion of the Bremer indictment from Granai's opinion, or, as testified to by the Florida Bar's witness, Caruncho, suggested that Bremer provide a certification that it had been dropped; he would not have differentiated the treatment of Richmond (as opposed to the other lenders) in the disbursal instructions; he would not have suggested the Granai trust arrangement, or thereafter, written to Granai asking that the promised documents be provided to Gallagher so that Granai could disburse the of-

It also makes it clear that Bremer's testimony at the prior Warehouse proceedings was unreliable, casting significant and material doubts on the results thereof and on the conclusions based thereon.

9. *Most important of all in the Florida Bar Case, in paragraph 52 of the First Bremer Affidavit, Bremer flatly admits*[27] *that Mr. Calvo believed that the purchase of stock by Bremer (as explained to Mr. Calvo) was unequivocably legal.*

10. Mr. Calvo has a right to due process guaranteed by the Fourteenth, Sixth and Fifth Amendments to the United States Constitution, and by Sections Two, Nine and Sixteen of Article One of the Florida

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fering proceeds held in trust; or, he would not have advised Gallagher that Gallagher could not sell out the huge Bremer stock position, except in reliance on the dribble out provisions of Securities and Exchange Commission Rule 144.

27. Confirming the assertions in the Granai deposition that Mr. Calvo was certain that the Bremer stock purchase was legal, and, confirming Bremer's testimony at the Final Hearing that, at the closing, Mr. Calvo did not believe that anything improper was being undertaken. Consequently, at most, the Florida Supreme Court should have found that Mr. Calvo misunderstood or mis-analyzed the Bremer proposal, as described to him by Granai.

Constitution, which included the right to representation by counsel, in the Florida Bar Case. That right was violated,[28] and consequently such proceedings should either be considered a nullity, or a hearing granted at which Mr. Chamberlin is permitted to participate.[29]

III. Unconstitutionality of DR1-102(A)(6)

1. The disciplinary rule on which the Florida Bar Case was based is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States. The due

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28. Mr. Calvo was also not represented by counsel at the grievance committee hearing because the Florida Bar refused to grant a short continuance permitting attendance by his attorney. The only continuance in the Florida Bar Case granted to Mr. Calvo was during the pendency of his successful appeal of the referee's decision limiting issues at trial. All of Mr. Calvo's other requests for postponements, even in the interests of clients facing federal criminal proceedings were rejected, while postponements to meet the Florida Bar's vacation schedule were liberally granted.

29. The right under the Florida Constitution to assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings, see Myles v State, 602 So.2d 1278 (1992). The case of Traylor v State, 596 So.2d 957 makes it clear that the evidence presented at the Final Hearing in violation of Mr. Calvo's right to representation by counsel is not competent evidence, and cannot be used to justify the Florida Supreme Court's decision in the Florida Bar Case.

process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[30] Such statutes, in a legal setting, lend themselves "to selective enforcement against unpopular causes," see **NAACP v Button**, 371 U.S. 415 (1963).[31]

2. DR1-102(A)(6)[32] provides as follows: "A lawyer

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30. See **Baggett v Bullitt**, 377 U.S. 360 (1964); **Keyishian v Board of Regents**, 385 U.S. 589 (1967); **Watkins v United States**, 354 U.S. 178 (1957); **Lovell v City of Griffin**, 303 U.S. 444 (19__); **Thornhill V Alabama**, 310 U.S. 88 (1940); **Talley v California**, 362 U.S. 60 (1960); **Edwards v South Carolina**, 372 U.S. 229 (1963); **Cox v Louisiana**, 379 U.S. 536 (1965); and, **Brown v Louisiana**, 383 U.S. 131 (1966).

31. See also **Southeast Aluminum Supply Corp. v Metropolitan Dade County**, 533 So.2d 777 (3rd DCA 1988).

32. DR1-102(A)(6) was not included in the revised rules governing the Florida Bar promulgated in 1987. However, the Florida Supreme Court refused to follow its prior rulings to the effect that repeal without a savings clause or substantial re-enactment of a rule regulating conduct renders it inapplicable, even in then pending cases. See

shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102(A), but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Florida Bar to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Florida Bar's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[33]

Fort v Fort, 104 So.2d 69 (DCA 1, 1958); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964); Pensacola & A.R. Co. v State, 1903, 45 Fla. 86; 33 So. 985, 986; and, State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959). Such refusal deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

IV. Improper Introduction of Decisions Based on Lower Standards of Proof

1. The decision in the Florida Bar Case was based almost entirely on the judgments of the District Court and Securities and Exchange Commission judge in the Prior Warehouse Cases.

2. The judgments were introduced at the hearing as evidence over the Respondent's objections, despite the fact that the standard of proof in the Prior Warehouses Cases (a preponderance of the evidence) was less than the standard of proof in the Florida Bar Case (clear and convincing evidence).

3. The Florida Supreme Court, contrary to its prior decisions on point[34] and decisions throughout the federal court system, held that their admission was appropriate and the different standards of proof af-

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33. See also **D'Alemberte v Anderson**, 349 So.2d 164 (1977); and, **State v Wershow**, 343 So.2d 605 (1977).

34. See Lawton v State, 13 So.2d 211 (1943), The Florida Bar v Price, 478 So.2d 812 (Fla. 1985).

fected only the weight of the evidence.

V. Constitutionally Prohibited Ex Post Facto Regulation

1. The Florida Supreme Court's decision amounts to the promulgation of constitutionally impermissible *ex post facto* standards governing professional conduct.

2. The Florida Supreme Court decision was based on an interpretation of securities laws totally contrary to that reflected in the Securities and Exchange Commission's own regulations, as well as in materials promulgated by the Florida Bar. The Florida Supreme Court determined that the expert witness' testimony introduced by the Florida Bar was proper and accurate concerning the Respondent's status as legal counsel to the "parties"[35] and as to the role of legal counsel as an

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35. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. Indeed, that factual conclusion flies in the face of the retainer letter entered into by the Beer firm replacing Mr. Calvo's firm, on September 24, 1984, which was introduced at the Final Hearing. See excerpts

"expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended.

3. In this regard, the Florida Supreme Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission Rules 436(e)[36] and 478.[37]

4. While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Exchange Commission, the federal courts or other

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from Bremer affidavits discussed in the Denied Motion for Rehearing, and discussions of the replacement as counsel in Mr. Calvo's brief and reply brief, all filed in support of this Petition.

36. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

37. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein.

states, the Florida Bar had itself indicated to the legal community in the State of Florida[38] that in the preparation of registration statements, attorneys were not to be deemed experts,[39] thus the Florida Supreme Court's change of interpretation involves the promulgation of constitutionally prohibited *ex post facto* regulation of professional conduct.

VI. Violation of Right to Equal Protection

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38. In light of the mandatory education requirements imposed by the Florida Supreme Court and the fact that such information was provided by the Florida Bar at one of the seminars presented in conjunction therewith, it is manifestly unfair and a violation of due process to disbar an attorney for relying on the information so provided.

39. See the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. This Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Florida Bar's expert, whose testimony was totally at odds with that presented by the Florida Bar in this seminar and publication! It is further asked to remember that, in the Gallagher Case, legal counsel to the Securities and Exchange Commission unequivocably stated that Mr. Calvo had provided neither oral nor written opinions in conjunction with the Warehouse closing.

The decision in the Florida Bar Case violates the Respondent's right to equal protection guaranteed by the constitutions of the United States and Florida in a number of ways, including assessment of costs,[40] failure to abide by decisions of the Florida Supreme Court setting the standards for Florida Bar disciplinary proceedings and imposition of disproportionate discipline on minority attorneys. The violation of equal protection involves, among other aspects, the fact that the Respondent's Colombian ancestry was made a finding of fact by the

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40. The Florida Supreme Court assessed all of the Florida Bar's costs against the Respondent, despite the fact that: (i) The Florida Bar's initial strategy of limiting issues at trial had been reversed by the Florida Supreme Court the previous year; (ii) The Florida Bar had been forced to drop a majority of the counts in its complaint against the Respondent when it found that they had not, in fact, ever been authorized, and would have violated the Respondent's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Florida Bar's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) The Florida Supreme Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2e proceeding. The Florida Supreme Court established the factors for assessment of costs in a case cited by the Florida Bar itself, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978). Such factors should have led to a determination that, even if the Florida Bar was successful in its case, each party should have borne its own costs. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions.

referee and was followed by prejudicial citation to irrelevant decisions by Florida Bar counsel, involving attorneys engaged in the narcotics trade.

VII. Due Process Violations Involving Discovery, Mandatory Judicial Notice, Exclusion of Improper Evidence and Introduction of Relevant Evidence

1. The Florida Bar and the Florida Supreme Court are bound by the guarantees of due process and equal protection imposed by the Florida and United States Constitutions.[41] In that regard, Mr. Calvo was entitled, during the conduct of the Florida Bar proceeding, to a meaningful ability to defend himself.[42]

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41. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (3rd DCA 1984).

42. See the following cases where the Florida Supreme Court found guarantees that should be applied to the Florida Bar Case: The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978); Florida Bar v Randolph, 238 So.2d 635 (1970); Lawton v State, 13 So.2d 211 (1943); The Florida Bar v Price, 478 So.2d 812 (Fla. 1985); Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Simmons, 391 So.2d 684 (1980); The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992); and, The Florida Bar v Agar, 394 So.2d 405 (1981).

2. Notwithstanding such rights, Mr. Calvo was deprived of his rights:

   A. To conduct meaningful discovery;[43]

   B. To have matters judicially noted under mandatory judicial notice provisions of Florida law, and to introduce relevant, competent evidence (as a result of the refusal of the referee to take such notice or admit such evidence);[44]

   C. To have inappropriate and prejudicial evidence excluded;[45]

3. The case of Banks v Vickery, 521 F.2d 814, 815

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43. As a result of protective orders granted in favor of the Florida Bar, as a result of the refusal of the Securities and Exchange Commission to provide copies of required materials, and, as a result of the alleged loss by the Florida Bar of years worth of its files, including the materials provided by Mr. Calvo to the Florida Bar in conjunction with its investigation.

44. Among the excluded materials were the proceedings in the Gallagher Case and the report of the American Bar Association and the Association of the Bar of the City of New York dealing with the ethical obligations of attorneys in matters involving securities laws.

45. *E.g.*, the Bremer hearsay testimony, the erroneous testimony of the expert witness and the final judgments in the Prior Warehouse Actions which involved lower standards of proof.

(1975), deals with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. While the plaintiff's did not succeed in their case, the court specifically found that states may not conserve or allocate a right to practice law;[46] and, that states cannot restrict practice of law in violation of rights to due process under federal and state constitutions.[47]

4. In **Davis v United States**, 415 F.Supp 1086 (1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings.[48]

5. In **Holman v Washington**, 364 F.2d 618 (1967), the court dealt with the use of prior evidence without a proper foundation. The court held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as

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46. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

47. At 1103.

48. The case specifically deals with attorneys, at pages 1091, 1092!

well as under the applicable state constitution. It indicated that a predicate to use of such indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. *As applied in the Florida Bar Case, such holding would prohibit the consideration of Bremer's testimony as to the statements made by Granai concerning Mr. Calvo's statements as to Messrs. Jenkins, Baldrica and Scherer, and Bremer's statements concerning the calculations made in Mr. Calvo's presence by Ms. Daniels, all of which have been subsequently denied in sworn affidavits.*[49]

6. In **Harrell v Tobriner**, 279 F.Supp 22 (USDC D.C., 1967), the court made it clear that the practice of law is a right,[50] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience. The

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49. It would also prohibit the testimony of the Florida Bar's purported expert.

50. That is clearly the case under Section One, Article Two of the Florida Constitution, see **State ex rel. Sbordy v Rowlett**, 190 So.2d 59 (1939).

case of Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials.[51] The court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process.

7. The Florida Bar has asserted that the practice of law is a privilege and not a right. That attitude is reflected in the manner in which the Florida Bar conducted the Florida Bar proceeding. Clearly, under federal constitutional law, that is not the case and Mr. Calvo was entitled not to a mere hearing, but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include the right to appropriate enforcement of discovery rights,[52] to

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51. It agrees with the holdings in Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405 (1981), cited by the Florida Bar for other reasons!

52. The referee refused to grant Mr. Calvo the right to propound more that 30 interrogatories to the Florida Bar, despite having been informed that because he lacked funds, the only discovery available to

timely notice of accusations against him, to a timely hearing of charges against him, to access to mandatory judicial notice as provided by statute, to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially where competent evidence was readily available). Just as clearly, Mr. Calvo was not provided a hearing that met such requirements.

Mr. Calvo was through interrogatories, requests for admission and requests for production of documents. Instead, the referee granted protective orders pursuant to which the Florida Bar had to respond to only five of the interrogatories propounded. A review of such responses, as well as to the response to Mr. Calvo's request for admissions makes it clear that the Florida Bar refused to provide meaningful discovery. Instead it ignored large bodies of irrefutable evidence contradicting its position, and successfully objected to its introduction at the hearing (*e.g.*, the Gallagher Case).

In addition to the formal restrictions imposed by the referee on the conduct of discovery by Mr. Calvo, he was deprived of access to most of his own records. He provided most of them to the Florida Bar during 1988 and such records were never returned. During 1990, in response to an inquiry from Mr. Calvo, the Florida Bar notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time the Florida Bar proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Securities and Exchange Commission, nor the Florida Bar were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, legal counsel to the Florida Bar admitted that several years worth of its files in the Florida Bar Case had disappeared.

8. The ability of a person to obtain a fair hearing is more difficult in an administrative setting, where the agency acts as prosecutor, judge and appellate body. In such cases, the agency must carefully monitor its agents to assure that they fully give due respect to the appropriate constitutional guarantees.[53] The Supreme Court failed to do that in the Florida Bar Case and such failure deprived Mr. Calvo of his rights to due process guaranteed by the constitutions of the United States and the State of Florida.

VIII. Unconstitutionally Nature of Discipline Imposed

1. The eighth amendment to the United States Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of the Florida Bar Case, when con-

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53. A recent newspaper article reported the formation of a rival bar association because of perceived corruption and cronyism in the Florida Bar.

sidered with the intervening punishment to which Mr. Calvo and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of Mr. Calvo is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Florida Bar.

2. The Neu case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Florida Bar's contentions; however, as in the case of most, if not all the cases cited by the Florida Bar, it does support the propositions which Mr. Calvo requested the Florida Supreme Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Florida Bar had to establish the element of intent by clear and convincing

evidence and that discipline in the Florida Bar Case would not serve the three purpose test referred to in that case.

3. At the final hearing, no evidence was introduced to indicate that Mr. Calvo intended to deceive anyone; rather, Bremer, the Florida Bar's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the referee's findings of fact concerning issues of Mr. Calvo's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[54]

4. With reference to discipline, the Florida Supreme Court held that it had to meet three tests:

   A. First, the discipline had to be fair to society, both in terms of protecting the public from

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54. The fact that Mr. Calvo believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits, relevant portions of which are included as exhibits to the Denied Motion for Rehearing, a copy of which has been filed in support of this Petition.

unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer.* In that regard, Mr. Calvo is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of Mr. Calvo's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, Mr. Calvo is, to the best of his knowledge, the only hispanic or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. While the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its pos-

ture in the Florida Bar Case. Indeed, references to Mr. Calvo's Colombian heritage were not placed in the record by the Florida Bar for his benefit, or for the benefit of Florida's large hispanic population.

B. Second, the punishment must be fair to Mr. Calvo, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing the Florida Bar Case and its myriad procedural deficiencies in the conduct of the Florida Bar Case. Obviously, the discipline recommended has no thought for rehabilitation.

C. Third, the judgment should be severe enough to deter others. In point of fact, when considered with the results of the injunction and 2e sanctions, no further discouragement is required.

IX. Defacto Double Jeopardy

1. Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991).

2. While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that the Florida Bar Case was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar Mr. Calvo.

3. Mr. Calvo has been twice tried and punished for the offenses again charged in the Florida Bar Case. The results of the Florida Supreme Court's current decision has put Mr. Calvo thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding

takes place before a new trier of fact, see **R.M. v State**, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served was not appropriate.

C. LACHES, WAIVER & ESTOPPEL

I. Introduction

1. The Florida Supreme Court failed to consider the multi-year lapse by the Florida Bar in filing the complaint in the Florida Bar Case after authorization therefor by the grievance committee, and the intervening notification to Mr. Calvo that he was, in fact, in good standing as a member of the Florida Bar, as a result of which Mr. Calvo and his family made drastic changes in their lives, at a cost of more than $400,000 in lost investments in out of state businesses.

2. Were it not for such notification and had Mr. Calvo been told that the grievance committee had recommended that he be disbarred,[55] he would not have

moved back to Florida and resumed his practice of law in Florida; rather, he would either have assumed an active role in the management of his family investments in North Carolina, or, returned to practice law in the State of New York.

3. The consequences of unjustified delays in Bar proceedings was addressed by the Florida Supreme Court definitively in the cases of **Florida Bar v Randolph**, 238 So.2d 635 (1970); and, **The Florida Bar v McCain**, 361 So.2d 700, 705 (Fla. 1978).[56]

Ii. The Randolph Case

The Randolph Case involved allegations that an attorney had misappropriated trust assets for his own benefit. The process was initiated in August of 1963, when a complaint was filed with a grievance committee

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55. He first learned of that recommendation during the Florida Bar's closing argument at the Final Hearing .

56. The refusal of the Florida Supreme Court to follow the standards it set in such cases in the Florida Bar Case deprived Mr. Calvo of his right to equal protection guaranteed by the Florida and United States Constitutions.

by interested parties. The transgressions were alleged to have been committed during a four year period starting in 1958 and ending during 1961. The Florida Supreme Court agreed with the findings of the referee that the attorney under prosecution's conduct was grossly irresponsible and almost willfully abusive.

1. A chronology of the case is presented at page 637 thereof and demonstrates that a period of approximately three years passed between the time a client complaint was filed with the grievance committee and the time a complaint initiating the action was filed. There is no indication that the complaint filed was, as in the Florida Bar Case, procedurally deficient (*i.e.*, the complaint in the Florida Bar Case was unsigned and contained a number of unauthorized counts which were subsequently voluntarily dismissed). The proceedings then took an initial three years until completion through the action of the Board of Governors. The aggregate period involved was approximately six years.

2. For purposes of comparison:

A. The Florida Bar Case appears to have been initiated during 1987[57] and resulted in a recommendation for prosecution by the grievance committee in 1989, however, inexplicably, Mr. Calvo was never notified of such determination. Whereas in the Randolph Case a complaint was properly prepared and filed in less than three months, the complaint in the Florida Bar Case was never properly prepared and was filed three years later.

B. During the interim, Mr. Calvo was suspended from practice before the Securities and Exchange Commission for a period of two years, a suspension which was completed during 1990. During such period Mr. Calvo ceased all legal activities in Florida and resided with his wife in North Carolina. After completion of the Securities and Exchange Commission suspension Mr. Calvo contacted the Florida

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57. Based on actions that took place on April 19, 1985 and April 22, 1985.

Bar concerning his status therewith and was provided with a certification of good standing, whereupon, Mr. Calvo and his family moved back to Florida and he restarted his legal practice. The move back to Florida eventually resulted in approximately $400,000 in losses in an investment in a hotel, partially as a result of extremely negative materials provided to a former employee by either the Florida Bar or the Securities and Exchange Commission.

C. In August of 1991, Mr. Calvo agreed to assist parties to the Warehouse related series of actions in their defense against Securities and Exchange Commission proceedings[58] and almost immediately thereafter, the Florida Bar filed its complaint against Mr. Calvo in the Florida Bar Case.[59]

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58. The Gallagher Case decided by the United States Court of Appeals for the 11th Circuit in May of 1992.

59. As a result of which Mr. Calvo's meaningful participation in such case was rendered impossible.

D. As a result of the Florida Bar's pursuit of a legal theory subsequently rejected by the Florida Supreme Court, a final hearing in the Florida Bar Case did not occur until September of 1992, and the referee entered his decision granting all of the disciplinary requests of the Florida Bar in December of 1992.

E. At the final hearing, the Florida Bar's substantive witnesses all indicated difficulty recalling the events in question because of the lapse in time, especially as to questions propounded by the defense.[60] In addition, substantial quantities of documentary evidence could not be provided, despite the Florida Bar's requests to the Securities and Exchange Commission, because the materials were either in storage or had disappeared.[61]

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60. That was also true concerning the Florida Bar's witness as to authentication of the unsigned complaint.

61. None of the original materials provided by Mr. Calvo to the Florida Bar during 1988 in conjunction with the Florida Bar's investigation were ever returned to him, and, the Florida Bar claims that it has lost all of its Warehouse files for 1987 and 1988.

F. In the Randolph Case, bar counsel was an unpaid volunteer, as opposed to the situation in the Florida Bar Case, where the prosecution was conducted by three attorneys employed on a full time basis by the Florida Bar. Thus, the Florida Supreme Court was careful not to be too critical. Furthermore, the Florida Supreme Court specifically found that once the final participants were in place, the matter was handled in a competent and professional manner. That certainly was not the case presented here. Furthermore, unlike the Florida Bar Case, the Florida Bar itself had played no role whatsoever in the underlying matter, whereas, in the Florida Bar Case, the Florida Bar refused to grant a continuance in an unrelated matter, as a result of which Mr. Calvo was prevented from even considering assuming a formal role in the Warehouse closing, or even dedicating more time, on an informal basis, to the Warehouse closing.

G. The Florida Supreme Court in the Randolph Case noted that the respondent and his family had been subjected to six years of agony, embarrassment, the stigma of community suspicion and criticism and the awesome professional embarrassment generated by the charges of serious breaches of ethics. In the Florida Bar Case, not only have Mr. Calvo and his family been subjected to similar agony, but he has during the interim served a two year suspension, and massive financial losses, not only from income that he did not derive, but the loss of his family's lifetime savings, at least in part as a result of improper conduct by personnel employed by the Florida Bar.

H. The Florida Supreme Court further noted that significant revisions to Bar procedures had been implemented by 1970 which would "eliminate many of the 'built in' delays previously existing." Quoting Burton Young, then

the Florida Bar president, the Florida Supreme Court noted that, in the future, disciplinary action would be completed within six months. The Florida Bar Case makes it clear that the Florida Supreme Court's observations were, unfortunately, unduly optimistic and gives credence to the current myriad calls for divesting the Florida Bar of authority to regulate the legal profession.

3. At page 639, the Florida Supreme Court, citing The Florida Bar v Wagner, 197 So.2d 823 (Fla. 1967), states as follows: *"We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgment as a form of discipline. That is so even though the record shows that the conduct of the lawyer merits discipline."*

4. It is submitted that, in the Florida Bar Case, the Florida Bar's conduct was significantly more inap-

propriate than that reflected in the Randolph Case, that the suffering and defacto and *de jure* penalties which Mr. Calvo and his family have been forced to endure have been significantly greater than those reflected in the Randolph Case, and that the evidence of culpable conduct was significantly less reliable. Especially when considered in light of the fact that Mr. Calvo completed discipline imposed by the Securities and Exchange Commission in conjunction with the facts involved in the Florida Bar Case more than three years ago, and that under applicable law, the incident is no longer even a disclosure item for federal securities law purposes, this Court is asked to to reject the conclusion of the Florida Supreme Court and instead, to determine that no further discipline of any kind is now warranted.

III. The McCain Case

The McCain Case involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench.[62] The action

by the Florida Bar was initiated immediately after the judge left the bench, which was three years after the acts which formed the basis for discipline.

1. The case was cited by the Florida Bar to support its contention that its un-excused and unexplained delays in initiating and prosecuting the Florida Bar Case ought to be ignored. The case does not support the Florida Bar's contention; however, its numerous legal conclusions clearly apply to the Florida Bar Case and are completely supportive of numerous elements of Mr. Calvo's petition for review. They involve the circumstances that warrant dismissal of Bar related actions involving unjustified delays, laches and estoppel; the nature of the evidence required to support a referee's findings of fact (*e.g.*, the inadequacy of hearsay

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62. The fact that the respondent in the McCain Case was a former member of the Florida Supreme Court should not be a factor justifying different analysis of the applicable factors. That the Florida Supreme Court did so violated Mr. Calvo's rights to equal protection and due process as guaranteed by the constitutions of the United States and the State of Florida.

evidence, and, the requirement that the referee's findings of fact be supported by clear and convincing evidence); that a referee's findings of fact will be overturned if they are clearly erroneous, or (*disjunctive*) if they are lacking in clear and convincing evidentiary support); the impropriety of willful and intentional tampering by members of the judiciary or its agencies with pending cases; the impropriety of assessing costs against a respondent where the Florida Bar took an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint; and, the duty of the Supreme Court to impose appropriate sanctions against the Florida Bar and its agents for acting irresponsibly. They also refer inconclusively to the issue of provision of notice that formal charges have been filed.

2. Such conclusions bear detailed discussion:

A. *Unjustified Delays:*

The Florida Supreme Court found that, while no hard and fast statute of limitations applied to Bar disciplinary actions, "*[l]awyers' rights may be protected without a mechanical and automatic rule setting forth limitations for actions involving misconduct.*" The court indicated that it would "*consider any unexplained, unreasonable delay in presenting the charges, and also, whether by reason of such delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation ....*" Further, the Florida Supreme Court indicated that limitations analogous to statutes of limitations would be appropriate if "*the nature of the circumstances of the particular case*" make it "*unjust or unfair to require the attorney to answer for such occurrence.*"

In the Florida Bar Case, the Florida Bar's delays have not been explained or justified and Bar counsel's objections during cross examination of its witnesses as to the ef-

fect of passage of time on their memories and the unavailability of documents from the Securities and Exchange Commission or the Florida Bar (which lost years worth of files), make it abundantly clear that the delay detrimentally affected Mr. Calvo's ability to conduct his defense. In the Florida Bar Case, the Florida Supreme Court should have, based on the criteria it established in the McCain Case, found the Florida Bar's action was barred as a result of its unreasonable delays. Failure to comply with its own criteria deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

B. *Latches*:

The Florida Supreme Court found that four conditions had to be met in order for latches to apply to Bar disciplinary proceedings: (1) Conduct on the part of the defen-

dant, or one under whom he claims, giving rise to the situation of which complaint is raised; (2) delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he based suit; and (4) injury or prejudice to the defendant in the event relief is accorded in the complaint.

All four elements were clearly present in the Florida Bar Case. (1) The subject proceedings were allegedly based on Mr. Calvo's conduct; (2) the Florida Bar, after having been informed of the grievance committee's decision, failed to initiate the action for several years, despite a statutory duty to act promptly, and with full ability to do so; (3) Mr. Calvo was never informed of the

grievance committee decision, and, instead, was, prior to return to Florida and resumption of practice, provided with written certification by the Florida Bar that he was in good standing; and, (4) success by the Florida Bar in securing discipline in the Florida Bar Case destroyed Mr. Calvo's re-commenced practice of law in Florida, Mr. Calvo and his family have been impoverished again, and he has again been subjected to already suffered public humiliation, scorn and ridicule. *Thus, in the Florida Bar Case, the Florida Bar's action should have been barred by the equitable doctrine of laches.* The Florida Supreme Court's failure to abide by its own standards violated Mr. Calvo's rights to due process and equal protection guaranteed by the Constitutions of the United States and the State of Florida.

C. *Estoppel:*

The Florida Supreme Court ruled that in order for the doctrine of estoppel to apply, three essential elements had to be established: (1) Words and admissions, or conduct, acts and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things; (2) in which the person so speaking, admitting, acting or acquiescing did so willfully, culpably or negligently; and (3) by which such other person is or may be induced to act so as to change his own previous position injuriously.

All three elements were clearly established in the Florida Bar Case. (1) The Florida Bar not only failed to notify Mr. Calvo of the grievance committee decision or to promptly file the required complaint, but affirmatively certified that he was in good standing with the Florida Bar; (2) At best, it must be agreed that the Florida Bar's failure to

notify Mr. Calvo of the grievance committee decision or to file its complaint, and its written certification to Mr. Calvo that he was in good standing, where wantonly negligent; and, (3) As a result of the Florida Bar's actions and failures to act, Mr. Calvo and his family moved back from North Carolina to Florida, lost a hotel, restaurant and lounge which Mr. Calvo's wife owned, resulting in the loss of approximately $400,000 in cash invested and three years of uncompensated labor. But for the Florida Bar's actions, Mr. Calvo and his family would either have stayed in North Carolina and continued the hotel, restaurant and lounge business there or Mr. Calvo would have resumed his practice in the State of New York, where he is also admitted. *Thus, in the Florida Bar Case, the Florida Bar's action should have been barred by the equitable doctrine of estoppel.* The Florida Supreme Court's failure to abide by its own standards

violated Mr. Calvo's right to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

D. *Evidence required to support findings of fact (e.g. the inadequacy of hearsay evidence and the requirement that findings of fact be supported by clear and convincing evidence); that findings of fact will be overturned if they are clearly erroneous, or (disjunctive) lacking in clear and convincing evidentiary support).*

This Court is asked to note that in the McCain Case the Florida Supreme Court upheld the referee's finding of fact that the hearsay statements of J. Vernon Wright, concerning a conversation he had with Judge D.C. Smith in which Judge Smith related that the defendant wanted improper action taken, was not clear and convincing evidence. In the McCain case, the integrity of Mr. Vernon, and his credibility were beyond question.

In the Florida Bar Case, the referee accepted the testimony of Edward Bremer, to the effect that Gary Granai had told him that Mr. Calvo had told him that Paul C. Jenkins, Robert Baldrica and James Scherer were heavy hitters whom Mr. Calvo would introduce for purposes of making loans to close the offering, and that Francesca Daniels had calculated the proper escrow period in Mr. Calvo's presence, and based thereon, made his findings of fact.[63] Clearly applying the McCain case standards, such findings of fact were unsupported by clear and convincing evidence, but rather by un-persuasive hearsay.[64]

Furthermore, Bremer, unlike Mr.

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63. Those assertions were contradictory to those previously made by Bremer in affidavits prepared for the Securities and Exchange Commission. See the excerpts therefrom included as exhibits to the Denied Motion for Rehearing filed in support of this Petition.

64. See **Holman v Washington**, 364 F.2d 618 (1967), regarding constitutional requirements applicable for introduction of hearsay evidence.

Wright, is a convicted felon and, as exposed by comparing the affidavits[65] he provided to the Securities and Exchange Commission and the Bremer tapes, with his testimony, is utterly incredible, as a matter of law.

The referee also accepted the testimony of the Florida Bar's purported expert, who had no personal knowledge of the facts at issue, almost no experience in small public offerings, and a demonstrated erroneous grasp of the applicable law, and based his findings of fact thereon.

3. *Clearly the McCain case should have led the Florida Supreme Court to reject the referee's findings of fact as clearly erroneous and unsupported by clear and convincing evidence.* The Florida Supreme Court's

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65. Excerpts therefrom are included as exhibits to the Denied Motion for Rehearing, a copy of which has been filed in support of this Petition.

The Denied Motion for Rehearing contains a crucial discussion of the differences, as well as the admissions favorable to Mr. Calvo in such affidavits.

failure to abide by its own standards violated Mr. Calvo's rights to due process and equal protection guaranteed by the Constitutions of the United States and the State of Florida.

4. In **Fuentes v Shevin**, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), the court outlawed the replevin statutes of numerous states, including Florida. Its relevance in the Florida Bar Case is its holding that the constitutional rights to due process require proper notice and a timely hearing. *In the Florida Bar Case, Mr. Calvo was not provided with notice of the filing of a complaint in 1987, the only notice being a 1988 notification that the matter was being referred to a grievance committee; Mr. Calvo was not provided with notice of the decision of the grievance committee during the fall of 1989 until receipt of a complaint in the Florida Bar Case during August of 1991. This despite the internal requirement elucidated by the Florida Supreme Court in the Randolph Case, that disciplinary matters be resolved within six months after initiation of an investigation.* Mr. Calvo was

therefore provided with neither meaningful notice nor a timely hearing.

D. Miscellaneous Matters

I. Attorney Client Privilege

The Florida Supreme Court has based its decision, in part, on a determination that Mr. Calvo's otherwise applicable duty of confidentiality, was superseded because the conduct of the participants in the Warehouse matter was criminal, regardless of whether or not a criminal proceeding was ever initiated. In that regard this Court is respectfully requested to note that Bremer testified that at the closing, there was no intent by anyone to engage in any improper conduct, and that intent is a critical element in the commission of a crime.[66] Thus, not only has a criminal action never been initiated, but the Florida Bar's own witness in chief has testified in a manner making such a determination inappropriate. All other participants in the Warehouse closing who hav

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66. In essence the Florida Bar Case stands for the proposition the attorney client privilege can be ignored if the attorney should have suspected that a client might not be telling th whether or not the attorney, in fact, had such doubts!

been subject to Securities and Exchange Commission proceedings have vigorously denied any wrongful intent. There is utterly no evidence indicating that Mr. Calvo was aware that anyone intended to engage in criminal conduct, and therefore, the Florida Supreme Court's decision should not be followed.[67]

II. Vulnerability of Victims

1. The Florida Supreme Court, addressing the issue of appropriate punishment, found the victims of the Warehouse closing to be especially vulnerable. The fact is that no evidence was introduced at the hearing by any purported victims. Without minimizing the seriousness of the fraud and misconduct perpetrated by Bremer (the Florida Bar's chief witness), the fact is that there were no widows and orphans involved in the Warehouse matter. Inves-

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67. The Florida Supreme Court indicated that Mr. Calvo was obligated to notify investors of a number of facts, however, it ignored the fact that Mr. Calvo could not, on his own, modify the Warehouse registration statement and that Mr. Calvo had no way of knowing who the investors were. Furthermore, the timing involved and the overlapping hearing which the Florida Bar refused to reschedule made any such attempt impossible.

tors in new issues are not vulnerable members of society, rather, securities laws as well as the know your customer rules of the National Association of Securities Dealers, Inc., wisely limit participation in new issues to sophisticated investors with substantial securities experience who, in addition, can afford the loss of their investment, a fact prominently reflected in the risk factor section of the registration statement.

2. In the instant case, a major portion of the non-Bremer investors invested through selected dealers who were licensed securities professionals and who were completely aware that the parties believed April 22, 1985, was the proper closing termination date. The bulk of the subscriptions, in fact, were submitted after April 7, 1985.

3. The Florida Supreme Court concluded that the Warehouse securities were worthless at the time they were issued. There was no support on the record for that conclusion. Rather, the facts demonstrate that from the time of closing until the

termination of trading when the Securities and Exchange Commission launched its actions, the Warehouse securities traded at a premium.[68] To this day, Bremer continues to claim that Warehouse was a legitimate company and presented investors with a reasonable investment opportunity.

4. The Florida Bar and its expert have taken the position that in making Warehouse related decisions, the only interest that should have been considered was protection of the new investors. However, Warehouse was an existing public company, with existing employees, and a large number of existing stockholders.[69] It would have been irresponsible to ignore their rights out of hand, and to have destroyed their company, if, in fact, there was a reasonable possibility that the factual allegations presented by Messrs. Bremer and Granai to Mr.

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68. A small premium, unlike the wild overcharging that later permeated the penny stock market.

69. The Warehouse stockholders prior to the offering unaffiliated with Bremer were no more or no less vulnerable than those who invested during the 1984-1985 public offering.

Gallagher were accurate. In fact, if the factual allegations presented by Messrs. Bremer and Granai to Mr. Gallagher were accurate and Mr. Gallagher had refused to close, then both Warehouse and its existing stockholders may well have had a cause of action against the underwriter for failure to use its best efforts to complete the offering.

III. The Florida Bar's Role

1. Perhaps the most incongruous aspect of the Florida Bar Case is the unrefuted fact that the Florida Bar played a direct role in the Warehouse closing fiasco. On April 22, 1985, the day of the Warehouse closing, the very same office of the Florida Bar that prosecuted the Florida Bar Case, had a date with Mr. Calvo which it refused to break.

2. It is unfortunate that bureaucrats in general and the Florida Bar specifically have become so aggressive in their quest for victory that they disdain the courtesies attorneys normally grant each other. Those courtesies have permitted the efficient functioning of a judicial system where scheduling conflicts are

the rule, rather than the exception. Such disdain, although technically unassailable, can have devastating consequences, like the Warehouse case.

3. Whether or not Mr. Calvo would have been able to more effectively participate in the Warehouse closing if he had been provided the time is speculative. Whether or not, given the brevity of available time, even if the Florida Bar had agreed to postpone its hearing on April 22, 1985, Mr. Calvo would have elected to assume a role as underwriter's counsel is speculative. That he was not provided such opportunity, or the opportunity to engage in all of the due diligence and factual verification that the Florida Bar now claims was required, is not speculative. That the Florida Bar itself was at least partially responsible for such failure is also not speculative.

4. While the Florida Bar cannot be blamed for the Warehouse fiasco, it is obvious that of all the agencies that have ever existed, it is most estopped from holding Mr. Calvo responsible for that which it itself prevented him from doing.

IV. Mr. Calvo's Background

1. In reaching a decision in this matter and evaluating the veracity of the parties and witnesses, the Court is requested to note that Mr. Calvo has a history of striving for excellence in the practice of law and in his role in society.

2. His parents were unable to pay for his legal education, and, like many other minority lawyers, he worked his way through law school. Mr. Calvo was a full time teacher, coached an equestrian team and headed two academic departments at the same time that he attended law school. Despite such additional responsibilities, Mr. Calvo graduated in the top ten percent of his law school class with a substantial quantity of additional credit hours in topics he deemed important to his professional development.

3. Wanting to be the best possible lawyer, Mr. Calvo thereafter immediately obtained an LLM degree, where he was again at the top of his class.

4. While, at the time, Florida had no continuing legal

educational requirements, Mr. Calvo imposed them on himself and was designated in not one but two areas of the law.

5. Mr. Calvo has always donated his time generously for the benefit of his community and to assist those who cannot afford to pay for legal services. He was one of the featured speakers in the Florida Bar's program on corporate law in 1985, the year of the Warehouse closing, and during the twelve month period following the Warehouse closing, contributed more than $20,000 to help build the Greek Orthodox cathedral in Fort Lauderdale. Despite the pendency of the Florida Bar Case and the attendant demands on his time, he was a founding director of his local Kiwanis club, he served as the chairman and president of his county's parents' & schools' council and served on his local elementary school advisory council.[70] None of such activities

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70. As a result of the decision in the Florida Bar Case, he has resigned from all such positions. However, he continues to make his time available to assist them on an informal basis.

were undertaken for purposes of generating professional clientele but rather, to comply with Mr. Calvo's perceived professional responsibilities to his community.

6. He also served as an unpaid presidential appointee to a local United States Selective System Board,[71] for years, both before and after the Warehouse matter.

7. These factors are not indicative of a person who takes his professional responsibilities lightly, or who meets the unprofessional profile in which the Florida Bar seeks to cast him; rather, they confirm the uncontested testimony of the many persons whose testimony on Mr. Calvo's behalf was presented to the referee in the Florida Bar Case.[72]

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71. An unpopular but critical job.

72. Although such testimony was totally ignored.

V. **Improper Emotional Appeal to Ethnic Background**

The referee in the Florida Bar Case found it important to make a factual finding that Mr. Calvo is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Florida Bar have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and the Florida Supreme Court should not have aligned itself with such blatant impropriety; especially when the Florida Supreme Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!

VI. **Mitigating v Aggravating Circumstances**

1. The Florida Bar, for the first time, during closing arguments, raised the issue of supposedly aggravating circumstances that justified the severe penalty

of disbarrment. That issue was not only not plead in the Florida Bar Case, but no evidence in support thereof was properly introduced at the hearing. In fact, such allegation and argument was totally refuted by the only testimony on point, that being the testimony of Messrs. Stein, Lipson and Vogel, Father Nicholas Nick and Mrs. Laura Gallagher as to Mr. Calvo's impeccable good character, honesty and integrity; and, the admissions on cross examination by the Florida Bar's witnesses, that Mr. Calvo had always insisted on full disclosure, never counseled improper conduct and that, in Bremer's case, as reflected in his taped, post closing telephone conversations, that Mr. Calvo would never permit anyone to do anything wrong. Indeed, Bremer's taped conversations with his attorney, Granai, after he had gone to the Justice Department, make it clear that, when Mr. Calvo first came to suspect that anything might have been wrong with the Warehouse closing, his advice was that trading in Warehouse stock had to be stopped. Again, there

was no support for the Florida Bar's argument in the record, and in fact, the evidence was overwhelmingly to the contrary. In addition, Mr. Calvo (to his detriment in light of the loss of his materials by the Florida Bar), completely and promptly cooperated with the Florida Bar in its investigation of the Florida Bar Case; and, his state of mind was certainly unusually distracted by the pendency of the Florida Bar's hearing on the date of closing.

2. The Florida Supreme Court's conclusion that Warehouse was not an isolated instance is contrary to the evidence, especially in light of the excerpts from Bremer affidavits included as an exhibit to the Denied Motion for Rehearing. All improprieties alleged occurred, if ever, during the period surrounding the weekend of April 19 through 22, 1985. No evidence of other similar acts was introduced.

3. In light of the foregoing, a weighting of mitigating versus aggravating factors clearly tilts materially in favor of Mr. Calvo.

VII. Reformation

1. Even if this Court were somehow to find that Mr. Calvo was provided all his Constitutionally guaranteed due process rights, that Disciplinary Rule 1-102(A)(6), remained a viable predicate for Bar actions, and, that the evidence at the final hearing supported a conclusion that Mr. Calvo had violated Disciplinary Rule 1-102(A)(6), this Court should reject the Florida Supreme Court's conclusions regarding discipline. It would be unfair to subject Mr. Calvo to discipline in addition to that already imposed by the Securities and Exchange Commission in the 2e proceeding, which was completed during July of 1990, more than three years ago. Under applicable Securities and Exchange Commission law, the Warehouse matter is no longer even a ripe disclosure item as a result of the passage of time since the issuance of the Warehouse injunction, more than six years ago.

2. The Florida Bar introduced absolutely no evidence of any wrongdoing of any kind by Mr. Calvo since

conclusion of the Securities and Exchange Commission sanction period. On the contrary, all of the evidence affirmatively and forcefully asserted that Mr. Calvo is an honorable and competent attorney and productive member of his community. The Florida Bar's inexcusable delays should not be permitted to again destroy Mr. Calvo's life, reputation and practice. If Bar discipline is imposed for the purpose of protecting of the public or to rehabilitate Mr. Calvo, then none can be said to be called for now.

VIII. Dispositive Factors at Investigation or Hearing

1. An investigation of this matter at which a small number of objectively ascertainable facts could be considered would be dispositive of the facts material to a decision in this case. Such facts would merely involve: (i) An examination of and introduction of third party financial reports on Messrs. Jenkins, Baldrica and Scherer for April, 1985; (ii) An examination of Ms. Francesca Daniels; and (iii) An examination of the records of the National As-

sociation of Securities Dealers, Inc., and the Florida Securities Division as to who filed materials on behalf of the underwriter in the Warehouse offering.[1]

2. In light of the procedural deficiencies in the Florida Bar Case, especially the exclusion of Mr. Chamberlin, such factors should be definitively considered and established prior to the imposition of any discipline.

WHEREFORE, the Respondent respectfully requests that this Honorable Court either make a determination that no discipline against the Respondent is warranted or refer this matter to either a grievance committee or special master for disposition.

Respectfully submitted, this 8th day of May, 1994.

\s\William A. Calvo, III\s\
William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue
Belleview, Florida 34420
(904) 245-4126

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1. Such investigation would reveal that Mr. Calvo had unquestionably been replaced as underwriter's counsel by the Beers-Wilks Firm.

Supreme Court, U.S.
FILED
93 1779 MAY 6 1994
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States
October Term, 1994

William A. Calvo, III,
Petitioner
- against -
The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX VOLUME III

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126

Dated: May 8, 1994

10-5 PM

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Representative Affidavit

In the United States District Court

For the Southern District of Florida

In the Matter of

William A. Calvo, III

No. 94-

AFFIDAVIT IN SUPPORT OF

MOTION FOR DIFFERENT DISPOSITION

STATE OF FLORIDA }

MARION COUNTY } ss.:

BEFORE ME, an officer duly authorized to administer oaths by the State of Florida, did personally appear on this 30th day of March, 1994, **WILLIAM A. CALVO, III,** known to me, who, being duly sworn, did state that he prepared the 46 page narrative annexed hereto and made a part hereof as exhibit A, and that based on his information and belief, it accurately reflects the matters described therein.

William A. Calvo, III

11355 Southeast 54th Avenue; Belleview, Florida 34420

Telephone Number (904) 245-1850

My commission expires:

_____

Angel N. Craig, Notary Public

Representative Narrative

The Electronics Warehouse Affair

Chapter One: Background

During August of 1984, I was introduced to Edward Bremer ("Bremer"), the president of the Electronics Warehouse, Inc., a Connecticut corporation ("Warehouse"), by Russell K. Gallagher ("Gallagher"), a recent acquaintance engaged in the stock brokerage business through a sole proprietorship (Gallagher & Company").

Warehouse was in the middle of a public offering but needed to amend its registration statement to reflect a change in underwriter and offering structure. I was asked to drop everything in order to make the required changes on a special project basis and further, was asked to consider replacing Gary Granai, the legal counsel to

Warehouse ("Granai"). I agreed to the project for a fee of $15,000, to be paid following the effective date of the required changes;[1] however, after talking with Granai, I declined to replace him.

I completed an initial hand-written[2] draft of the changes required to the registration statement which was picked up at my office by Bremer and taken to a typing service for incorporation into the materials to be filed by Granai with the Securities and Exchange Commission. At that time I was asked if I would consider filing the amended registration materials on behalf of Gallagher with the National Association of Securities Dealers, Inc. (the "NASD"), and with state securities ("blue sky") regulators. I indicated that I would be glad to assume such role and would charge an additional $15,000 ($5,000 to be paid immediately, and the balance at closing on the

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1. I had quoted a fee of between $7,500 and $10,000, *if it was prepaid*. However, Bremer had insisted on a delayed payment and I correspondingly increased the fee, which he accepted.

2. My law firm had just purchased a sophisticated multi-user computer system, which promptly crashed, thus we were unable to type our own materials.

offering). Messrs. Bremer and Gallagher accepted the proposal and were to provide me with the initial $5,000 retainer required.

Bremer had my handwritten changes incorporated into a registration statement and filed with the Securities and Exchange Commission by Gary Granai as post effective amendment number one.[3] The amended registration statement listed my law firm as legal counsel to the underwriter; however, no consent to the use of our name in that capacity was obtained from us or filed with the Securities and Exchange Commission.[4]

Notwithstanding the agreement with Messrs. Bremer and Gallagher concerning the retention of my law firm to assist Gallagher with NASD and blue sky filings, on September 24, 1984, the law firm of Robert

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3. The only document used in the Warehouse offering with which my law firm was involved. Such fact was admitted by Bremer in a number of affidavits to the Securities and Exchange Commission.

4. Three subsequent post effective amendments were filed by Warehouse with the Securities and Exchange Commission, only the last of which became effective. My firm had no involvement therewith, already having been replaced by the Beer-Wilkes Firm.

Beer and Stephen Wilkes in New York (the "Beer-Wilkes Firm") was formally retained by Bremer[5] to perform such functions, purportedly because Mr. Beer, as the former chief enforcement counsel with the NASD, could have the changed registration statement approved by the NASD on an expedited basis. Thereafter, all NASD and blue sky filings were undertaken by the Beer-Wilkes Firm.[6] I was informed of such decision in late September of 1984, and thereafter, on November 8, 1984, the revised registration statement was declared effective.

Notwithstanding our removal from such assignment, my wife and I were socializing with Gallagher and his wife Laura, and my firm started representation of Gallagher & Company on other matters, most notably the

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5. A retainer letter was signed by the Beer-Wilkes firm on that date.

6. There was substantial correspondence concerning blue sky matters between the Beer-Wilkes Firm and the Gallaghers. That would have been appropriate only if the Beer-Wilkes Firm was acting as underwriter's counsel but would have been utterly inappropriate if my firm was playing such role because attorneys are not permitted to communicate directly with persons represented by other attorneys on matters subject to such representation.

underwriting of securities for Dennison, Inc. (an offering in which, as in Warehouse, Barnett Bank acted as escrow agent). Thus, although it was our understanding that we had been replaced by the Beer-Wilkes firm in the Warehouse matter, we considered the Gallaghers and Gallagher & Company as our clients on other matters.

During January of 1985, I was approached by Gallagher concerning the possibility of retaining my law firm to assist with the closing on the Warehouse offering. I indicated that we would assume such role if we were paid $5,000, plus costs and disbursements, for such services.[7] Because the closing did not take place, we were never retained, although we were provided with proposed forms of closing documents to review. Shortly thereafter, my firm received a series of letters between Bremer, Granai and Barnett Bank (the escrow agent for the public offering), pursuant to which the Warehouse offering was

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7. The price was significantly less than the initial $15,000 quoted in September of 1984, because the responsibilities were substantially less, all of the due diligence, NASD filings and Blue Sky filings had been completed by the Beer-Wilkes Firm.

extended until April 22, 1985. The letters were placed in our closed Warehouse file without review or action since we were not acting as legal counsel to Gallagher & Company on that matter.

During February of 1985, I was requested by Granai to provide him with the names of securities industry professionals who could assist in the placement of the Warehouse offering and I gave him the names of three people, Francesca Daniels, David Jordan and Hermann Burckhardt. Mr. Granai gave the names to Bremer and Gallagher.[8] Messrs. Bremer, Granai and Gallagher thereafter contacted Ms. Daniels, and arranged a meeting in Florida to discuss her participation. I was present for the meeting with Ms. Daniels in Florida because she was a personal friend, stayed at my home during her visit, and I formally introduced her to Messrs. Bremer and Gallagher. Mr. Granai did not attend the meeting.

Using her contacts, Ms. Daniels arranged an introduction to a co-underwriter and requested that she be

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8. The Gallaghers already knew Mr. Jordan.

hired as a financial consultant by Warehouse. Bremer declined to meet her financial terms and no relationship was ever entered into. Bremer contacted both Jordan and Burckhardt but they were unable to assist him. The only matters that Bremer discussed with Ms. Daniels and Messrs. Jordan and Burckhardt were possible introduction to stock brokerage firms that might have an interest in acting as selected dealers or co-underwriters in the Warehouse offering.[9]

During late March of 1985, I received a telephone call from Granai informing me that Bremer had been indicted for mail fraud in an unrelated matter. He indicated that he was representing Bremer in the matter and that his investigation indicated that Bremer was innocent and that the indictment was a ploy to force him to testify against a friend. I responded by advising Granai that either the offering should be terminated or Bremer

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9. Bremer claimed to the Securities and Exchange Commission in sworn affidavits that they were introduced as potential lenders, however, he recanted such sworn statements at the Florida Bar final hearing (described later).

should resign from all Warehouse roles and a post effective amendment to the registration statement filed disclosing such resignation.[10] I thereupon immediately contacted Gallagher and advised him of my conversation with Granai. Sometime shortly thereafter Granai again called indicating that he had talked with Bremer and that Bremer had agreed to resign. He also indicated that a post effective amendment to the registration statement would be filed.[11]

I did not hear from anyone associated with the Warehouse offering again until Monday, April 15, 1985, when I was contacted by Granai concerning whether or not Bremer could legally guarantee that an investor in the Warehouse offering would receive a profit. I

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10. Bremer admitted such fact in one sworn affidavit, denied it in others and denied it at the Florida Bar hearings.

11. In my conversations with Granai and Gallagher concerning the Bremer matter, I did not consider that I was acting as legal counsel to Gallagher, nor did I bill for such services. Rather, as I often did with many attorneys and stock brokers, I felt I was acting gratuitously, in a friendly endeavor to solicit future business or solidify existing relationships.

responded that, in my opinion, he could not and expressed surprise that the offering was still alive.[12] I also asked as to the status of the registration statement amendment and Bremer's indictment. Granai informed me that an amendment to the registration statement had not been required because Bremer had obtained politically influential legal counsel who had managed to have the indictment "dropped."

After Granai's telephone call on Monday April 15, 1985, no one from the Warehouse offering group (Granai, Bremer or Gallagher) contacted me until Friday morning, April 19, 1985, when all of them walked into my law firm and stated that they were closing on the Warehouse offering, that day![13]

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12. Granai confirmed my surprise in his testimony to the Securities and Exchange Commission.

13. Bremer refused to admit such fact at the Florida Bar final hearing; however, in sworn affidavits provided to the Securities and Exchange Commission many years earlier, Bremer admitted that he and Granai flew into Fort Lauderdale on the evening of April 18, 1985. Furthermore, the Bremer tapes (described hereafter) included conversations between Bremer and Granai were they alluded to the fact that I was being kept in the dark about the closing until the last minute, when it would be "sprung on me." Evidently, Bremer, Granai and Gal-

No one had made any appointment and my firm was totally unprepared to participate in a closing for the Warehouse offering. Nonetheless, I made my conference room available to "my friend" Gallagher, and to Messrs. Bremer and Granai for certain pre-closing activities. We also provided one of our law clerks, Joe Caruncho,[14] to assist in compiling a closing document check list.

During the morning of April 19, 1985, I had a full schedule of appointments and was able to meet with the Warehouse offering group only as a courtesy, and even then, only intermittently. During a brief interlude, they came into my offices, at the request of Gallagher, to ask for my views on certain matters that had apparently first come up. These dealt with three issues:

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lagher expected that I would agree to represent Gallagher at the closing; however, because of the lack of adequate preparation time, I did not!

14. He was awaiting admission to the Florida Bar, having already taken and passed the required examinations. He had been hired by my firm based on the effusive recommendations of the administrator of the Securities and Exchange Commission's Atlanta Regional Office, where he had been employed the previous summer.

1. Bremer and Granai had informed Gallagher that as a result of the delay in closing the offering, Bremer (or a Bremer affiliate) had been forced to advance more than $350,000 to Warehouse for purchase of inventory, supplies and services disclosed in the use of proceeds section of the registration statement, and that Bremer was to be reimbursed, at the closing, for such advances;

2. Bremer and Granai had informed Gallagher that Bremer, or a Bremer affiliate, was prepared to purchase up to $250,000 of the securities offered by Warehouse if they were not otherwise subscribed for in the offering;[15] and

3. Bremer had sold his receivable from the

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15. I did not focus on the issue of whether or not such subscription was required to meet minimum offering requirements because Bremer was still talking about an over-subscribed offering, and the $250,000 subscription was well within the $300,000 difference between the minimum offering and the maximum offering. In hindsight, the other loans were probably not disclosed to me because they would have raised such issue!

Warehouse offering in order to purchase such Warehouse securities.

Gallagher wanted to know whether or not I was aware of any reason why such matters might be improper. I made it clear that I did not have the time to legally research the issues or verify the underlying facts;[16] however, after a brief mental analysis as well as inquiries to Bremer (to verify that his advances corresponded to items specifically allocated in the use of proceeds section of the registration statement), I replied that, except for restrictions on Gallagher's participation in arranging financing in violation of Regulation T, I knew of no impediments.[17]

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16. The Securities and Exchange Commission clearly took the position that I had provided neither oral nor written opinions to anyone concerning closing on the Warehouse offering, during the appeal of the Gallaghers Securities and Exchange Commission proceedings to the United States Court of Appeal for the Eleventh Circuit.

17. My conclusion was influenced by the fact that the proposed $250,000 investment by Bremer, was below the $300,000 difference between the minimum and maximum offering disclosed in the prospectus, and thus, did not alert me to any pre-planned machinations to attain the minimum offering.

Gallagher responded, supported by Bremer and Granai, that he had played no role in securing the funds Bremer intended to use to purchase securities in the offering.

I suggested to Gallagher that verification of the Bremer advances should be reflected in the cold comfort letter to be provided at closing by the independent accountant for Warehouse. Bremer and Granai agreed but indicated that such a cold comfort letter could not be provided that day because the Warehouse accountant was in Connecticut. I then suggested to Gallagher that the offering proceeds that were to be paid to Warehouse be held in trust by Granai until the cold comfort letter and certain other closing instruments were provided to Gallagher. He accepted that suggestion and Bremer and Granai also agreed.[18]

At that point, a copy of the opinion of counsel to be provided by Granai was called to my attention, and I

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18. Such fact was confirmed in a May 1, 1985, letter from me to Granai, which the Securities and Exchange Commission obtained from Granai's files.

noticed that a paragraph specifically disclaimed an opinion concerning the Bremer indictment. I informed Gallagher that, in my opinion, such language was not satisfactory, and that he needed to verify that the indictment had been dropped, either through an amendment to Granai's opinion letter or by a formal certification of some sort. Granai agreed to modify his opinion letter, but I also found such modification inadequate. Granai indicated that because he had been replaced as counsel to Bremer in the indictment matter he could not properly opine thereon and it was suggested by Bremer, after a purported call to his new indictment counsel, that his new indictment counsel would provide required documentation at the time that the accountant's cold comfort letter was provided.[19] Gallagher accepted such compromise, with the understanding that Granai would not release proceeds of the offering that he was to hold in trust until such verification was provided.

Mr. Granai then held a five minute, quasi seminar

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19. Such fact was confirmed by Joe Caruncho, acting as a witness against me, in the Florida Bar hearing.

for his client and Gallagher, advising them of provisions of securities laws that would apply to insiders after the closing. I also joined in comments, and both Granai and I stressed that there were significant restrictions on the transactions that Bremer could undertake in the securities he was purchasing. My recollection is that we discussed the application of Sections 13(d) and 16(b) of the Securities Exchange Act of 1934, as amended, and the application of Rule 144 to control stock transactions. We were wrong about sections 13(d) and 16(b), because Warehouse was exempt from their application. We also discussed the fact that Bremer's subscription would have to be cut back, to the extent others wanted such stock, because of NASD "hot issue" rules (at that time I had been convinced that the offering was likely to be over-subscribed). During that time Granai was also insistent that Gallagher not charge a commission on securities that might be purchased by Bremer or Bremer affiliates but Gallagher refused, indicating that he would need all proceeds that he was contractually entitled to in order to maintain a liquid market in Warehouse stock.[20]

It was then lunch time and the Warehouse group invited me and Nina Gordon, my senior associate (to whom Granai referred as the SEC at my firm) to join them for lunch. I suggested Rolands', a popular restaurant located near my office, and we left in separate cars. While entering Rolands I met Paul C. Jenkins, a friend who was employed as a salesman with Star of David Memorial Gardens in Broward County, Florida, and introduced him to the group.[21] We then sat for lunch in a large booth at the rear of the restaurant. Because we were all receiving a number of calls, the owner plugged a telephone near our booth. While I was not privy to the calls being received by Bremer, Granai and Gallagher, I assumed that they were the normal flurry of calls from

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20. I did not charge for such advice nor did I feel that I had resumed a formal role in the Warehouse offering.

21. At that time, Mr. Jenkins was experiencing financial difficulties and had borrowed several thousand dollars from me. Nonetheless, Bremer subsequently claimed that I introduced him to Mr. Jenkins for purposes of arranging a huge loan to Bremer, a claim obviously denied by Mr. Jenkins.

investors, selected dealers and others that normally accompany the period prior to and following closing on a public offering. I left early, having a busy after lunch schedule, but Nina Gordon remained.

That afternoon I received a telephone call from one of the Warehouse offering group, I believe it was Granai, who told me that they had decided to postpone the closing until Monday because of logistical problems. He requested that, as a professional courtesy, I prepare disbursement instructions for the escrow agent specifying that the person who had purchased Bremer's account receivable ("Richmond") was to be paid directly from the closing, and, perhaps foolishly and without giving it very much thought, I agreed. Granai indicated that Richmond would be calling my offices to verify that the disbursement letter provided for payment to him directly from the closing proceeds, and Richmond in fact made such a call.[22]

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22. Richmond had also verified such fact directly with personnel at Barnett Bank, who on Friday April 19, 1985, had already received such instructions directly from Bremer and Granai.

After work that Friday afternoon (as was our custom at the time) my wife and I went to Shooters, a popular waterfront restaurant and lounge in Fort Lauderdale. When we got there, we ran into an advertising executive with a small local firm, Bobby Baldrica, who was accompanied by a local real estate broker, Jim Scherer, and sat at their table. They were celebrating a new account or something and we joined them for some champagne. While we were seated with Messrs. Baldrica and Scherer, a group of people, including Bremer, Granai and Gallagher, approached the table, and we introduced the people we knew. The gathering was purely spontaneous and involved no pre-planning by anyone. Messrs. Scherer and Baldrica stayed briefly, joined in conversations, and then left. My wife and I left shortly thereafter.[23]

The following Monday, some time around one

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23. Bremer subsequently claimed that I had pre-planned the meeting for the purpose of arranging loans to close the Warehouse offering. However, such claims were denied by Messrs. Baldrica and Scherer, who, at such time, like Mr. Jenkins, were in no position to make loans to anyone. In addition, I had never even heard of Mr. Scherer prior to that day.

o'clock in the afternoon, I received a telephone call from someone employed with the escrow agent indicating that funds required to close had been deposited, and that a closing on the Warehouse offering had started. The escrow agent's office was about five minutes away, by car, and I left to see about collecting the $15,000 fee for our work on post-effective amendment number one for Warehouse, which we had earned during August and September of the prior year.

When I arrived, I distributed copies of the disbursement letter that I had been asked to prepare, but which I had theretofore neglected to deliver; however, the escrow agent had already received identical disbursement instructions from Messrs. Granai, Gallagher and Bremer, and had engaged in detailed discussions concerning the Richmond payment with Mr. Richmond.

During the closing, a broker outside the closing room (with a name that sounded like Kolonosky) was insisting that the offering not close until a $250,000 wire from his clients was received into the escrow account, however, the escrow agent had determined that the last

second for receipt of proceeds into escrow was at two o'clock, and closing, without the Kolonosky proceeds, was declared ended by the escrow agent at that time. The final tally on the escrow account was in the area of $1,230,000+ and the offering would have been close to oversubscribed if the Kolonosky wire had arrived on time.[24]

I stayed for several minutes, received our firm's check, and left. I did not attend the subsequent closing party. My firm provided no closing opinions, closing statements or other traditional materials provided by underwriter's counsel at a securities closing. I neither billed nor received any payments in conjunction with the closing, or indeed, in conjunction with any activities on behalf of either Warehouse or Gallagher, except for payment of the invoice for services during August and Sep-

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24. Because of the purported Kolonosky wire, we anticipated that the offering would have been close to oversubscribed, and that the $250,000 Bremer stock purchase would not have involved the minimum offering, but rather, the difference between the minimum offering and the maximum. Apparently, the Kolonosky transaction was a phony ploy designed by Bremer to deceive Gallagher and me.

tember of 1984, because it was my unequivocal impression that since our replacement by the Beer-Wilkes firm during the fall of 1984, we had not acted or served as legal counsel for any Warehouse related matters (although we had discussed retention for closing purposes during January of 1985).

The Beer-Wilkes Firm was paid a fee of more than $15,500, from the offering proceeds for their role in the offering.

During early May of 1985, Gallagher told me that he had not yet obtained the cold comfort letter, indictment dismissal certification or his underwriter's warrants from Bremer and requested my help. In response, I wrote to Granai suggesting that his client was probably tired of waiting for the closing proceeds and that he should promptly provide the required documents to Gallagher.[25] Gallagher did not seek any further assistance on that matter thereafter.

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25. Granai provided such letter to the Securities and Exchange Commission during the Warehouse investigation.

During June of 1985, Bremer and Gallagher paid an unannounced visit to my office during which Bremer appeared to be attempting to force Gallagher to buy a block of the Warehouse stock purchased by Bremer at the closing. He implied that Granai or someone else thought that there might have been something wrong with the purchase of stock by Bremer. I responded by asking the following series of questions: (1) Had Bremer actually been entitled to refund for advances from the closing proceeds; (2) Had such advances in fact represented expenses for which proceeds of the offering had been allocated in the use of proceeds section of the Warehouse prospectus; (3) Had Gallagher, in fact, avoided any assistance in arranging the personal loan used by Bremer to buy his Warehouse stock; and, (4) Had unaffiliated subscribers who wanted to participate in the offering been given a preferential right to subscribe to the stock purchased by Bremer. Bremer replied in the affirmative and I indicated that I knew of nothing wrong with such offering. There appeared to be some other problem involving the payment by Gallagher to Bremer

of funds for a small sale of Warehouse stock (I assumed under Rule 144's control stock provisions), but I neither concentrated on such dispute, nor have any meaningful recollection pertaining thereto.

Chapter Two: The Securities and Exchange Commission Investigation

During the summer of 1985, I came to know Gary Granai more closely (we had first met on April 19, 1985) and had agreed to an of counsel relationship with him. During late July of 1985, while I was in New York on a business trip with Granai and Arthur J. Leibell, another potential member of my firm, I was informed by my office that the Securities and Exchange Commission had subpoenaed all of our Warehouse files. Granai could think of no reason for the subpoena and I immediately contacted Roger Sherman, the Securities and Exchange Commission attorney involved, and requested details of the investigation so that I could properly advise Gallagher concerning whether or not he should cease trading Warehouse stock. I then placed calls to Bremer and Gallagher, both of whom professed not to know what was

wrong. On at least one occasion, I indicated to someone at Bremer's office that unless I could be assured that there were no legal problems involving Warehouse I would have to recommend to Gallagher that he cease trading its stock.[26]

During August of 1985, I met with Granai, the Gallaghers, Arthur J. Leibell, (a former Securities and Exchange Commission staff member who had agreed to join my firm as a partner) and two unrelated attorneys who had also been Securities and Exchange Commission staff members (Jack Stein and another attorney with his firm) in Fort Lauderdale for purposes of determining what might be going on with Warehouse. I carefully questioned Gallagher and Granai, but we could think of nothing that might have been wrong.

Sometime during the fall of 1985, the Securities and Exchange Commission subpoenaed me for testimony concerning Warehouse. During that deposition I found out, for the first time, that:

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26. Such recommendation was reflected in a conversation with Granai taped by Bremer.

1. Bremer had lied about making advances to Warehouse and was, in fact, not entitled to any portion of the proceeds at closing, and had no receivable to sell to Richmond;
2. Bremer had purchased, not the $250,000 in securities indicated during the April 19, 1985, discussions, but rather in excess of $600,000 in securities, and had paid for all such stock with borrowed funds which were paid back immediately after the closing, not with funds to which he had any claims but with proceeds of the offering. In addition, he also used proceeds of the offering to pay huge commissions to the lenders;
3. The escrow agent had erroneously calculated the escrow termination date, as a result of which, the escrow agent should have returned all the proceeds in the escrow account to the investors on April 8, 1985;
4. It appeared, but the Securities and Exchange Commission attorney would not confirm, that

Bremer's indictment had not, in fact been dropped; and

5. Granai had released the proceeds of the offering to Bremer immediately after the closing, notwithstanding his promise to hold them until Gallagher received the accountant's cold comfort letter, the certification that Bremer's indictment had been dropped, and the underwriter's warrants.

After the deposition I questioned Gallagher about the documents that Bremer and Granai were to provide him prior to release by Granai of the proceeds to Warehouse and was informed that he had only been provided with the underwriter's warrant, but that he had forgotten about the other requirements.

I also questioned Granai, and he claimed that he:

1. Did not recall the trust arrangement involved in the closing;[27]

2. Knew about one additional loan to Bremer,

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27. Despite my reference thereto in the May 1, 1985 letter.

but had verified that Bremer was owed in excess of $450,000 by Warehouse through personal inspection of inventory, equipment, catalogues, *etc.*;

3. Believed that the stock purchased by Bremer was not restricted under Rule 144, but merely subject to the Section 16(b) restriction on short term profits, and that Gallagher had agreed to resell it all for Bremer immediately following the closing;

4. Had taped conversations with Bremer concerning Bremer's allegations that the indictment had been dropped, and could provide me with copies thereof; and

5. Was amazed that the escrow agent had miscalculated the offering termination date.

Chapter Three: The Securities and Exchange Commission Litigation

Background

Immediately prior to Christmas, 1985,[28] Jack Stein, an attorney who had accompanied me to my investigative testimony before the Securities and Exchange Commission, was informed that although the testimony from different witnesses had been contradictory, the Securities and Exchange Commission concluded that I had plotted the entire fraudulent closing. That conclusion was based on testimony provided by Bremer and on a secret submission to the Securities and Exchange Commission by Barnett Bank, the escrow agent.[29] Apparently, Barnett Bank had agreed to provide standby funds required to make investors whole,[30] in exchange for not being

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28. Warehouse related matters always appear to occur around Christmas.

29. Barnett Bank has succeeded in keeping its testimony to and agreements with the Securities and Exchange Commission secret through a court order sealing the files. However, un-confirmed information has leaked out on which the discussion thereof contained in this narrative is based.

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prosecuted[31] and in exchange for the initiation of an action by a receiver to recoup funds from the other persons involved in the Warehouse closing,[32] from which Barnett Bank would be reimbursed.[33]

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30. During the early stage of the litigation, an attorney for Barnett Bank contacted me and the Gallaghers, offering us non-recourse loans against vastly inadequate security (in my case, a $500,000 loan against $30,000 in equity in my house), if we used the proceeds to settle the Warehouse receiver's action. Being innocent and unwilling to sell ourselves to protect Barnett Bank, we declined.

31. Prosecution would have been very problematic for Barnett Bank because it had been enjoined from committing future securities law violations in conjunction with handling securities escrow accounts, and an additional violation would have subjected it to criminal contempt sanctions, as well as prosecution under criminal aspects of federal securities laws. That would have had a very negative impact on its aggressive acquisition program, in addition to the myriad of associated criminal problems, including possible invocation of federal RICO laws.

32. Evidently, the receiver collected funds only from Granai and from me (I returned our $15,000 fee, plus $10,000). Bremer and Richmond, who accounted for more than half of the proceeds, were allowed to keep their "loot" in exchange for favorable testimony, and the Gallagher's recently settled the receiver's $165,000 claim in exchange for $8,000.

33. Such reimbursement was a direct violation of the Securities and Exchange Commission's policy against indemnification in securities law cases, and is illustrative of the degree and amount of political clout that Barnett Bank was able to bring to bear in the Warehouse affair.

The Beer-Wilkes firm had, apparently using their strong contacts at the Securities and Exchange Commission enforcement division,[34] persuaded the Securities and Exchange Commission to treat me as having served as underwriter's counsel during the entire offering period, and to totally ignore their role in the offering, notwithstanding the September 24, 1984 retainer agreement, the fact that they filed the Warehouse registration statement with the NASD and the state Blue Sky authorities, and, the fact that they received a substantial fee for such services.[35]

Leibell Jumps Ship

During April of 1986, the Securities and Exchange Commission prepared to file two law suits involving the Warehouse matter, an action seeking injunctions, and an action seeking to recoup the proceeds of the offering (for purposes, unbeknown to us and never publicly admitted, of reimbursing Barnett Bank). In order to increase the

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34. Beer had served as chief enforcement counsel with the National Association of Securities Dealers, Inc.

35. A fee they were never required to return!

expenses of defense, the Securities and Exchange Commission brought both proceedings in the United States District Court sitting in Hartford, Connecticut.

The intention to file the law suits was leaked by a staff member to Arthur J. Leibell, a former Securities and Exchange Commission staff member and at the time a partner in my firm ("Leibell"). Leibell was then my attorney for Warehouse related matters.[36] Rather than preparing to defend me, Leibell warned our two associates, Joe Caruncho and Nina Gordon, that continued association with me would be detrimental to their careers and made plans with Caruncho to leave before the litigation commenced. Caruncho gave notice, and, while I was representing clients in Texas, Leibell and Caruncho moved out, taking firm files, equipment and furniture that belonged to my wife. In addition, Leibell ap-

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36. Leibell and I were supposed to be stockholders in Calvo & Leibell, P.A., a Florida professional corporation originally organized by Leibell as Arthur J. Leibell, P.A., but changed when we became partners. I was also a director and the president thereof. That firm in turn, was a member of a partnership of professional corporations practicing under the name of Calvo, Bofshever, Perry & Leibell (the "CBP&L Firm").

propriated all funds in our firm accounts and arranged with Barnett Bank to have all of my family's personal accounts terminated and all of our outstanding loans called.[37]

Immediately after that weekend, the Securities and Exchange Commission served its complaints. Rather than being prepared to conduct an aggressive defense as had been planned and prepared with Leibell, I was left without an attorney, without access to funds, and with panicked clients who had been contacted by Leibell with suggestions that they join him in his new practice. I arranged to have Mark C. Perry ("Perry"), a member of the

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37. At the same time, Leibell appropriated the corporate book and stock certificates for Calvo & Leibell, P.A., and took the position that he had never issued my stock or elected me to the positions agreed upon, although Arthur J. Leibell, P.A., had accepted over $10,000 in cash as a stock subscription (which was never refunded), changed its corporate name, opened and maintained bank accounts under the new name, filed tax reports, used stationary and handled client matters and filed official court papers as Calvo & Leibell, P.A. He then filed dissolution documents for Calvo & Leibell, P.A., with the Florida Department of State and provided the Securities and Exchange Commission with an affidavit that we had never been partners and that he had never been my attorney for Warehouse related matters.

CBP&L Firm represent me, and we immediately left for a hearing in Connecticut, where the Securities and Exchange Commission sought to obtain a temporary retraining order.

The Bremer Concoction

At that hearing I learned that Bremer had been convicted of a federal misdemeanor and that the 17 count indictment had been dropped to a single count, but not dismissed. I also learned that since June of 1985, Bremer had been cooperating with the Justice Department and Securities and Exchange Commission in order to deflect blame from himself, Barnett Bank[38] and the Beer-Wilkes Firm, onto his attorney (Gary Granai), the Gallaghers and me.

Evidently, Bremer and Granai had counted on pres-

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38. Prosecution would have been very problematic for Barnett Bank because it had been enjoined from committing future securities law violations in conjunction with handling securities escrow accounts, and an additional violation would have subjected it to criminal contempt sanctions, as well as prosecution under criminal aspects of federal securities laws. That would have had a very negative impact on its aggressive acquisition program, in addition to the myriad of associated criminal problems, including possible invocation of federal RICO laws.

suring Gallagher to sell the Warehouse stock that Bremer had purchased in the offering to make up the funds Bremer had stolen from the offering proceeds in order to buy such stock and pay the associated "premiums." When, based on my advice, Gallagher had refused to make sales except as permitted under Rule 144, Bremer had panicked and met with the principals of the Beer-Wilkes Firm, where a fictional scenario was concocted, and immediately implemented. The principals of the Beer- Wilkes Firm walked Bremer over to an attorney (Marty Kaplan) with Securities and Exchange Commission and Justice Department connections even better than Beer's, and together they placed calls to the Securities and Exchange Commission and Justice Department.

The Bremer Tapes

Bremer, who had been taping his Warehouse related calls almost since the beginning of the Warehouse offering, began making a series of telephone calls and arranged a series of meetings (all taped) for the purpose of developing evidence for use by the Securities and Ex-

change Commission and Justice Department. Although Bremer sought to entrap the Gallaghers and me in such conversations, making questionable comments himself, such efforts were unsuccessful. Indeed, in one of such taped conversations, Laura Gallagher expressed to Bremer that I would never have permitted anyone to do anything wrong, and Bremer agreed.[39]

Notwithstanding the fact that the Bremer tapes (both prior to and after the meetings with the Justice Department and Securities and Exchange Commission) refuted most (if not all) aspects of the story concocted by Bremer and in at least one instance demonstrated that the Beer-Wilkes Firm was aware as early as the first week in May, 1985, that Bremer had fraudulently closed the offering, the Securities and Exchange Commission decided to conduct its litigation based on the scenario developed by the Beer-Wilkes Firm and Bremer. The trial strategy employed ever since by the Securities and Exchange

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39. Bremer has always admitted that at the time of the Warehouse closing I was of the opinion that everything was being done legally.

Commission and later, by the Florida Bar, has been to protect the Beer-Wilkes Firm and Barnett Bank by blaming the Gallaghers and me for everything, by depriving us of effective legal representation, by keeping the Bremer tapes out of official consideration, and by impairing my ability to earn sufficient funds to conduct a successful defense.

The Securities and Exchange Commission's Allegations

In essence, the allegations of the Securities and Exchange Commission, backed by affidavits from Bremer, were that:

1. After the failed January closing, I had offered to assist Bremer find emergency loans to fraudulently close the offering.[40]

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40. Bremer, in affidavits, indicated that the proposed lenders were Ms. Daniels and Messrs. Jordan and Burckhardt. Such allegations were denied by Ms. Daniels and Messrs. Jordan and Burckhardt in their own affidavits. At the Florida Bar's hearing, those allegations were contradicted by Bremer himself, who finally admitted that Ms. Daniels and Messrs. Jordan and Burckhardt had been contacted solely in conjunction with assisting in finding stock brokers interested in fully legal participation in the Warehouse offering.

2. That I knew that the Bremer indictment had not been dropped.[41]

3. That I had represented Gallagher, as

At the Florida Bar hearing, Bremer indicated that the proposed lenders I had supposedly introduced were Messrs. Jenkins, Baldrica and Scherer (previously referred to). Because of the improper disqualification of my legal counsel at the final bar hearing, the testimony of Messrs. Jenkins, Baldrica and Scherer was not available at the final hearing; however, they subsequently provided affidavits making it clear that although they had been introduced by me to Bremer, Granai and Gallagher, either at Rolands or at Shooters, on April 19, 1985, such meetings had not been pre-planned and they had never been approached to make loans. In fact, uniformly, each expressed that at that time they had no ability to make loans to anyone for any purpose.

Bremer also sought to infer at the Florida Bar's hearing that I had a pre-existing relationship with Richmond. However, Richmond, in his transcribed testimony to the Securities and Exchange Commission and testifying on behalf of the Florida Bar:

1. Flatly denied such assertion indicating that he had seen me for the first time at the Warehouse closing;

2. Testified that the closing had started prior to my arrival there, and that I first provided Barnett Bank the disbursal instruction letter at that time;

3. Testified that he had personally confirmed with Barnett Bank, on the Friday prior to the closing, that it had been i

n41. Although I vigorously denied such fact, the Securities and Exchange Commission used

underwriter's counsel, throughout the offering period, and in such role, had an obligation to monitor events involving the Warehouse of-

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distortive motions to obtain an order from the Judge in the hereinafter discussed injunction action, deeming it admitted that I knew the indictment had been dropped, as of the date that the request for such admission had been propounded (over one year after the fact).

The order was based on a motion by the Securities and Exchange Commission asserting that I was not diligently seeking the information required to permit me to answer its request for admissions, and that they should therefore be deemed admitted. That order was thereafter used by the Securities and Exchange Commission as evidence that I knew the indictment had not been dropped, as of the closing date, more than one year earlier.

It was the specific recollection of my wife, who was my office manager at the time of the Warehouse closing, that Mr. Caruncho had been asked by me on April 19, 1985, to verify that the indictment had been dropped by making a call to either the prosecuting attorney or Bremer's indictment counsel, and that Caruncho had advised me that he had verified such fact. Mr. Caruncho denied my wife's recollection of the event. I know that either Mr. Caruncho is lying, or he and I had confused the issue, with Mr. Caruncho merely having obtained such verification from Granai, while I assumed that he was referring to either the United States Attorney or Bremer's indictment counsel.

fering and to amend the Warehouse registration statement to disclose any material changes thereto.[42]

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42. The Securities and Exchange Commission took the position that, when I prepared my handwritten changes to the registration statement during August and September of 1984, I should have disclosed that:

A. Bremer would be indicted *the following March*;

B. Bremer would *subsequently* advance funds to Warehouse for items reflected in the Use of Proceeds section of the Prospectus, and request reimbursement therefor at closing;

C. Bremer would borrow funds from Richmond to be repaid out of the offering proceeds;

D. Bremer would buy stock in the Warehouse offering the following May; and

E. The offering termination date would be miscalculated and the offering would close late.

The Securities and Exchange Commission took that position despite the fact that:

A. The instruction to Securities and Exchange Commission Form S-18 pursuant to which the Warehouse registration statement was filed makes it clear that it must be executed by the registrant's chief executive officer, chief financial officer and by a majority of its board of directors, and, that Securities and Exchange Commission Rule 478 specifies that only persons signing a registration statement may amend or withdraw it. Thus, even had I been underwriter's counsel, and, even had I been apprised of the actual facts, I would not have had standing to amend the Warehouse registration statement;

B. There was a written retainer letter with

the Beer-Wilkes firm dated September 24, 1984, pursuant to which it, in fact, prepared and filed all materials required to clear the Warehouse offering with the NASD and state Blue Sky authorities, functions admitted by the expert witness testifying for the Florida Bar at the Final Hearing to be traditionally performed by "underwriter's counsel;"

C. The Securities and Exchange Commission had provided all copies of materials directed to the underwriter's counsel to a third law firm un-associated in any manner with mine.

D. There is no current technology that would have permitted me to predict, in August and September of 1984, the specified events that took place during 1985 (although I now keep a crystal ball on my desk, next to my computer).

4. That as underwriter's counsel, I was respon-

sible for determination of the proper closing date and assuring that investor funds were returned if closing did not take place prior thereto. That determination was made despite the specific allocation of responsibility to the escrow agent contained in Securities and Exchange Commission Rule 15c-2(4).

The Securities and Exchange Commission and later the Florida Bar largely relied on the testimony of two associates at my firm,[43] Nina Gordon and Joseph Caruncho,[44] and on my conversations with Granai and

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43. Who had been warned by Leibell to disassociate themselves from me or risk their careers.

44. Nina Gordon, who had been assigned to work on the Warehouse matter during 1984, denied ever having performed any functions with reference to Warehouse other than quasi-secretarial matters, directly at my specific instructions. Her denials were contradicted by her time sheets, as well as by the testimony Laura Gallagher, Gallagher's wife, and of Joseph Caruncho concerning her role at my firm. Her testimony was distractive and not relevant, but it had the effect of making it seem that I was trying to blame an innocent young woman for my malfeasance. That was not my intention. Indeed, I agreed with her that she had very little involvement with Warehouse because my firm had only a very limited involvement with the offering. However, she indicated that she did not know that we had been replaced as legal counsel.

Gallagher during the offering period.[45]

Joe Caruncho, who had assisted Gallagher, Bremer and Granai, to prepare for a closing on the morning of April 19, 1985, by preparing a pre-closing checklist, testified that he thought the closing occurred at our offices that morning (*there is no dispute that he was mistaken, since the closing took place the following Monday, at Barnett Bank*), and that because Warehouse had counsel present, he assumed that we were representing the underwriter. However, on cross examination he admitted that prior to that Friday, he had never heard of Warehouse (despite the fact that we had weekly staff meetings at which all pending firm projects were discussed); that no one had specifically indicated to him that my firm was representing the underwriter; and, that his role had involved no substantive review of any materials, rather, it was limited to preparation of a list of documents that the underwriting agreement indicated would be provided at the closing. *More importantly, he testified at the Florida Bar Final Hearing that Bremer or Granai had promised to provide a certific*
a45. During the offering period:

1. *I had a conversation with Gallagher concerning participation by my firm in a potential closing during January of 1985;*

2. *I had conversations with both Granai and Gallagher on one day during late March of 1985, concerning the Bremer indictment;*

3. *I had one conversation with Granai on Monday, April 15, 1985, concerning the illegality of guarantees to potential investors, and the fact that the Bremer indictment had been dropped;*

Interference with Counsel

Starting with the Securities and Exchange Commission's subversion of Leibell, it successfully

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4. *On April 19, 1985, I briefly met with and made my conference room and Mr. Caruncho available to Granai, Gallagher and Bremer; had lunch at Rolands with Granai, Gallagher, Bremer, Nina Gordon and my wife; spoke by telephone with Granai and Richmond concerning the purported factored receivable; and, ran into Bremer, Granai, Gallagher and at least one other person with them, at Shooters that evening, while having drinks with Messrs. Baldrica and Scherer.*

5. *On April 22, 1985, I attended the Warehouse closing for approximately 1/2 hour to deliver the past due letter promised to Richmond and to collect the statement for my firm's services on post effective amendment number one during August and September of the prior year.*

6. *Neither I nor anyone in my firm filed any Warehouse related documents with the Securities and Exchange Commission, the National Association of Securities Dealers, Inc., or any Blue Sky authorities.*

prevented me from using legal counsel in my defense, except in conjunction with the hereinafter discussed 2e proceeding.

A. After the defection of Leibell, I paid Mark C. Perry, to represent me in the Warehouse litigation. However, at the April 1986 hearing in Connecticut, the Securities and Exchange Commission objected to his participation, based on a provision of the rules regulating the practice of law in Connecticut which could be interpreted as preventing a member of a law firm from appearing as legal counsel for another member.

B. During the injunction proceeding, I was required to retain local Connecticut counsel, counsel of record in New York (Ira Postel), and, to prepare materials for their use through attorneys employed by my firm (Calvo & Associates, P.A.) and an additional professional corporation in which I was a member after February of 1987 (Calvo, Perry

& Greene, P.A.). However, when my counsel of record sought to use attorneys in my firm to take depositions in Florida (by prior agreement with the Securities and Exchange Commission counsel) the Securities and Exchange Commission replaced such counsel, reneged on the agreement, and prevented me from taking the depositions, depriving me of my ability to conduct meaningful discovery.[46]

C. During late 1987, G. Richard Chamberlin, a long time friend, agreed to assume my representation. Specifically, he sought unsuccessfully to have a re-hearing on the Securities and Exchange Commission's motion for summary judgment based on the fact that the Securities and Exchange Commission had withheld evidence (various contradictory ver-

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46. *They then convinced the Judge in the injunction action to preclude me from taking the depositions of Bremer and Granai, or to take any other depositions unless I paid all expenses of attendance for all the parties involved, an economic impossibility for me at that time.*

sions of Bremer affidavits and the Bremer plea bargain agreement). In addition, he was to represent me in a 2e proceeding that the Securities and Exchange Commission thereafter filed and in an appeal of the District Court's decision in the injunction action.

Mr. Chamberlin was immediately subjected to a motion for sanctions for daring to file for the rehearing, and he and his wife were subjected to a series of unrelated Securities and Exchange Commission investigations. In addition, the Securities and Exchange Commission interfered in Mr. Chamberlin's application for admission to the Florida Bar. As a result of such pressures, Mr. Chamberlin was forced to withdraw from my case, weeks before oral argument in my appeal, which was resultantly waived and the appeal lost.

D. During the final hearing on the Florida Bar proceedings, many years later, Mr. Chamberlin, who had represented the Gallaghers and

me in Warehouse matters, agreed to represent me[47] and lined up a series of witnesses and prepared a comprehensive trial strategy.

At the hearing, Bar counsel succeeded in having Mr. Chamberlin excluded, claiming that he intended to call him as a rebuttal witness. Of course, not having been privy to the facts in the case, other than as an attorney, he could not have testified, nor was he in fact called. The result was that my law partner, who had no knowledge of securities laws, only a vague idea of the issues involved, and who had never met any of the witnesses, was forced to assume my defense, without any preparation time at all. Because of his total unfamiliarity with the case or the witnesses, my substitute attorney could only call me as a witness and missed the opportunity to refute the highly prejudicial, hearsay testimony of

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47. An act requiring significant courage in light of his earlier experience.

Bremer through introduction of testimony from four critical witnesses, all of whom subsequently provided affidavits (Ms. Francesca Daniels and Messrs. Paul C. Jenkins, Bobby Baldrica and James Scherer) totally contradicting Mr. Bremer. As a result, my ability to defend myself was critically impaired.

Lack of Discovery

My attempts to conduct discovery were totally circumvented by the Securities and Exchange Commission and the Florida Bar.

A. My legal counsel served the Securities and Exchange Commission with a broad request for production of documents to which the Securities and Exchange Commission responded by claiming that they had an open file policy and that I was welcome to their entire file provided I use a copy service recommended by the Boston Regional Office and that such service pick up, copy and return the materials to the Securities and Exchange

Commission themselves. We agreed and were presented with a huge quantity of material, at a copying cost of more than $3,000. Unfortunately, the copied material included numerous duplicate copies of lengthy documents (designed to run up our expenses) and did not include very important parts of the file (the Bremer affidavits and a plea agreement entered into by Bremer). It also excluded the materials filed by Barnett Bank and the agreements between Barnett Bank and the Securities and Exchange Commission which had been declared secret and sealed by the court.

B. My legal counsel scheduled a series of depositions in Florida and Connecticut, including depositions of Bremer and Granai. By agreement between the Securities and Exchange Commission attorney and the attorneys in my firm who were assisting in my defense, two attorneys from my firm, acting as local counsel

to my New York counsel of record, were to take the depositions. When we arrived at the first deposition, the Securities and Exchange Commission had changed its attorneys and refused to honor the agreement. They objected to the depositions and insisted that I take them myself (I had no litigation experience). Mark C. Perry refused, and the deposition was adjourned.

The depositions were renoticed but the Securities and Exchange Commission filed a motion asking the Court to preclude me from taking the depositions scheduled for Connecticut (Bremer's and Granai's) and requiring me to pay expenses for all parties (legal, travel, *etc.*) for the depositions in Florida. The Court granted such motion and I was prevented from deposing Bremer and Granai, and because I did not have the tens of thousands of dollars required to pay the fees and expenses of counsel for the numerous

parties, could not take any of the Florida depositions.

C. The Securities and Exchange Commission used my testimony as an important aspect of its case. It also doctored the transcript by losing 45 pages. When this was called to its attention, it "corrected" the problem by renumbering the pages making it seem that the transcript was whole. Needless to say, it then artfully took statements totally out of context and presented the testimony as a confession of recklessness.

D. During the Florida Bar proceedings, I was unable to take depositions because I was without funds to pay for them. Therefore, I was forced to rely principally on requests for admission, requests for production of documents and interrogatories. The Florida Bar refused to respond directly or meaningfully to my requests for admission, provided some documents but claimed that the first two years of

its files had "been lost;"[48] and, refused to respond to my interrogatories, rather the Florida Bar obtained a protective order from the judge in charge of the proceeding precluding me from serving more than 30 interrogatories (which I had already served), and, as to those served, providing that the Florida Bar need only respond to five.[49]

Summary Judgment

While my record counsel was on vacation in Europe, the Securities and Exchange Commission filed a motion for summary judgment, and opposed my requests for enlargement of time to respond (despite the fact that the court thereafter took more than one year to rule on the motion), as a result of which, the response was prepared by Barry Smith, an employee of Calvo, Perry & Greene, P.A., with little experience, and filed by Mr. Pos-

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48. Among the lost files were massive quantities of documents I had been required to produce, and which were never returned to me.

49. None of which were adequately responded to.

tel with no opportunity for review. The materials filed failed to include required affidavits and neither Mr. Smith nor Mr. Postel filed the thousands of pages of Securities and Exchange Commission testimony that supported the brief.

Despite the fact that the exhibits to my responsive brief were missing, and that 45 pages of text from my Securities and Exchange Commission testimony had "disappeared" the court proceeded to find that:

A. I (not the Beer-Wilkes Firm) had acted as counsel to the underwriter throughout the offering, and that as such, I was responsible for amending the Warehouse registration statement in order to reflect material changes in the information contained therein.[50]

B. I was aware of the Richmond loan and was reckless in not verifying that Bremer had in fact made advances to Warehouse. In addi-

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50. As discussed elsewhere, Securities and Exchange Commission rules did not permit me to file amendments to the registration statement, see, e.g., *Rule 478.*

tion, the Court found that even had I verified such advances, I should have amended the registration statement to disclose such advances.

C. I was aware that Bremer or a Bremer affiliate was going to purchase stock in the offering, and should have amended the registration statement to disclose such fact.

D. I was aware that Bremer had been indicted and should have amended the registration statement to disclose such fact, whether or not the indictment had been dropped. It also found that I knew the indictment had not been dropped.

E. I, and not the escrow agent, was responsible for calculating the offering period, and had no right to rely on Barnett Bank's calculation therefore; consequently, I, and not Barnett Bank, was at fault for the delayed closing and the failure of Barnett Bank to return investors' funds after April 7, 1985.[51]

F. That my continued claim of innocence was evidence that I had not (unlike Bremer) repented for my actions.

G. That although I had no history of violating law, because I was a securities attorney I would be presented with opportunities to violate securities laws in the future unless I was enjoined.

H. That in reaching such conclusions, it had not relied on Bremer's affidavits (although they were quoted from more than 30 times), but rather, solely on the excerpts from my testimony to the Securities and Exchange Commission (and that the 45 missing pages did not affect the credibility of the transcript), and on my admissions.

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51. The Court ignored the fact that until Granai's call on April 15, 1985, I thought that the offering had been terminated. It further ignored the fact that nothing I could have done on April 19, 1985, could have affected the failure of Barnett Bank to return investor funds 12 days before.

Chapter Four: The 2e Proceeding

Mr. Chamberlin started his representation of the Gallaghers and me during 1987, and, found that the Securities and Exchange Commission had withheld what he felt was crucial evidence, a Bremer affidavit contradicting the one provided by the Securities and Exchange Commission in support of its motion for summary judgment and authenticating the Bremer Tapes,[52] and, a Bremer plea bargain agreement.[53]

Mr. Chamberlin filed a motion for rehearing which was not only denied, but, the Court reprimanded Mr. Chamberlin and me for having filed it.

Immediately after denial of the motion for rehearing, the Securities and Exchange Commission suspended me from practice before it in reliance on Rule 2e of its

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52. Which the Securities and Exchange Commission had successfully excluded in the summary judgment proceeding based on their non-authentication.

53. Mr. Chamberlin then obtained the testimony of Bremer's indictment counsel to the Securities and Exchange Commission, which reflected that he was negotiating on Bremer's behalf based on Bremer's assistance in the Warehouse litigation.

Rules of Procedure, without a hearing. I was permitted to challenge such suspension in a subsequent hearing, by which time my law practice had been destroyed. The Securities and Exchange Commission proceeding sought to have me permanently barred from appearing or practicing before it.

At the 2e hearing, the judge was a Securities and Exchange Commission employee who was prohibited from reconsidering the facts of the case or the fact that a securities law violation had been committed as a result of the Securities and Exchange Commission procedural rules which governed the proceeding. *However, based on my testimony and the testimony of numerous witnesses, he found that I had been deceived by Bremer and Granai, and, that the attorneys for the Securities and Exchange Commission had engaged in unethical prosecutorial tactics by lying about the holdings of numerous cases, which placed their whole presentation in doubt.*[54] *Based on such facts, the Securities and Exchange Commission judge ruled that I*

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54. An egregious practice also engaged in by counsel to the Florida Bar.

should not be permanently barred. Rather, he agreed that a two year suspension, almost all of which had already been served as a result of the automatic suspension during the proceedings, would be appropriate, and that thereafter I should again be permitted to practice before the Securities and Exchange Commission.[55]

Chapter Five: The Florida Bar

I notified the Florida Bar of the decision and indicated that, because an appeal would, in fact, extend the period of automatic suspension, I did not intend to appeal it. The suspension period expired in July of 1990, and I made plans to resume my law practice.[56]

I initially intended to resume my practice in New

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55. During the interim, my wife and I had invested our life savings in a hotel in North Carolina, where we lived between April of 1989 and January of 1991. During 1990, a fired employee obtained detrimental materials from either the Florida Bar or Securities and Exchange Commission which he used to devastate our hotel by ruining our reputation in the area. Such materials were to be have been treated confidentially under then applicable Florida Bar rules.

56. Because almost all of my practice involved securities law, the Securities and Exchange Commission suspension was served as a suspension from all practice of law.

York State; however, after contacting the Florida Bar to verify whether or not I was in good standing,[57] we decided to return to Florida and did so in January of 1991. As a result of our return, we had to turn the North Carolina hotel over to a manager and as a result of our absence and the unfavorable publicity engendered by the materials released by the Securities and Exchange Commission or Florida Bar to the former employee, the hotel was forced into bankruptcy, costing my wife, our small sons and me a loss of approximately $400,000. Notwithstanding the loss of everything we owned we were satisfied that at least we could start our lives over again.

The Florida Bar began an investigation of the Warehouse matter during 1987, but never advised me thereof or permitted me to respond to the charges until I was notified that the matter had been referred to a grievance committee during 1988. I fully cooperated with the investigation and provided the counsel appointed to investigate the matter with all of my Warehouse files.[58]

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57. And having been informed that I was.

During June of 1989, the grievance committee held a hearing in South Florida. I requested that the hearing be postponed so that I could be represented by Mr. Chamberlin, but the request was denied, as a result of which I attended without legal counsel.[59] At the hearing, the Florida Bar took up all of the time and I was not permitted to present a rebuttal, rather, the committee afforded me an opportunity to present my case in writing.[60] I prepared a voluminous submission which was tendered to the committee in July of 1989, and the committee was

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58. All such files, together with all Florida Bar files pertaining thereto for the initial two years of the investigation were apparently lost by the Florida Bar. I was to find that out for the first time during the Florida Bar hearing.

59. The Florida Bar asserted that I had no legal right to counsel at that time, and that even permitting me to participate in the hearing was discretionary.

*60. Interestingly, a member of that committee, Steve Josias, was a banking industry lobbyist who was featured in a television magazine report for his role in a South Florida banking scandal (*i.e.*, he was a member of Senator Graham's staff while he was lobbying for and representing CenTrust, one of Florida' largest S&L fiascoes). He, of course, has never had to answer for any resulting ethical violations.*

to reconvene and afford me an opportunity to respond to questions. I was never afforded such opportunity, rather, evidently during September of 1989, the committee authorized the initiation of proceedings against me.

Despite the provisions of rules requiring the Florida Bar to promptly initiate disciplinary proceedings, it did nothing for almost two years. The Florida Bar never informed me of the grievance committee decision; rather, in response to my inquiry as to my status it provided me with a written certification that I was in good standing. As a result, rather than resuming my law practice in New York State, my family and I returned to Florida.

I resumed my Florida practice by forming an association with G. Richard Chamberlin, who had successfully represented me in the Securities and Exchange Commission 2e proceedings, and shortly thereafter, with the Belleview, Florida, firm of Houston & Houston, P.A.

Mr. Chamberlin had been representing the Gallaghers in Warehouse related proceedings before the Securities and Exchange Commission, which were decided against them during July of 1991. The Gal-

laghers requested that I assist them in their appeal of the Securities and Exchange Commission decision to the United States Court of Appeals for the Eleventh Circuit, and requested that we represent them on a *quasi pro bono* basis, since they had no way of earning a living. My wife and I were very apprehensive about such role since we had reason to fear retaliation; however, we felt that it was our ethical and moral duty to assist fellow victims of the Warehouse scam and despite our fears, I became co-counsel.[61]

I proceeded to formulate an appellate strategy which concentrated heavily on the responsibility of Barnett Bank for the improper closing. Within weeks after I prepared the appellate brief, the Florida Bar filed its complaint in this matter. It was so hastily prepared that it contained a number of unauthorized counts and was not signed by the presiding officer of the grievance committee, as required by the applicable rules of procedure.[62]

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61. Of course, the Gallaghers were advised of potential conflicts, which they waived in writing.

62. Indeed, it was never even presented to him for review, as required by the applicable rules of procedure.

I immediately had to shift my attention thereto and was precluded from meaningful participation in the Gallagher's appeal.[63]

The Florida Bar's initial tactic involved precluding me from introduction of any evidence by claiming that the 2e decision automatically resulted in a violation of Florida Bar ethical obligations. It obtained an order from the judge appointed as referee limiting issues at trial to the appropriate discipline After one costly year of litigation, the Supreme Court reversed the order and directed that a complete hearing be held at which all matters would be considered *de novo*.

During such interim, the Florida Bar acknowledged, without excuse, that it had not informed me of the grievance committee decision, which apparently was never put in writing, and that its complaint contained numerous unconstitutional *ex post facto* counts, which it voluntarily dropped.

It based the remaining allegations on repealed dis-

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63. That appeal was subsequently unsuccessful.

ciplinary rule 1-102(A)(6),[64] which provided as follows: "*A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law.*" The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102(A), but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Florida Bar to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Florida Bar's prosecution thereunder should not have been permitted.[65]

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64. DR1-102(A)(6) was not included in the revised rules governing the Florida Bar promulgated in 1987. However, the Florida Supreme Court refused to follow its prior rulings to the effect that repeal without a savings clause or substantial re-enactment of a rule regulating conduct renders it inapplicable, even in then pending cases. See Fort v Fort, 104 So.2d 69 (DCA 1, 1958); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964); Pensacola & A.R. Co. v State, 1903, 45 Fla. 86; 33 So. 985, 986; and, State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959). Such refusal deprived me of my rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

65. See Webb v Department of Professional Regulation, Board of Professional Engineers, 595 So.2d 1103

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During the time that the order to limit issues at trial was under appeal, I attempted to obtain discovery from the Florida Bar. The Florida Bar resisted and obtained a protective order, the result of which was that I was limited to five interrogatories, unresponsive responses to requests for admission, and limited documents.[66]

After reversal of the order to limit issues at trial, the referee scheduled a final hearing, which was set to conform with the vacation schedule of Florida Bar counsel. While I had been forced to conduct proceedings on my own due to financial difficulties, Richard Chamberlin, my former partner and the attorney most familiar with Warehouse matters as a result of his role in the Gallagher proceedings and my several cases, agreed to conduct my defense at the hearing. My law partner, Larry D.

(5th DCA 1992); and, Delk v Department of Professional Regulation, 595 So.2d 966 (5th DCA 1992). See also D'Alemberte v Anderson, 349 So.2d 164 (1977); and, State v Wershow, 343 So.2d 605 (1977).

66. At that time, the Florida Bar failed to disclose that the massive quantity of documents I had provided in 1988 and all of the Florida Bar files for the initial two years of the investigation had "disappeared."

Houston, volunteered to assist him as to technical evidentiary issues.[67] Prior to the hearing I provided the referee and Florida Bar counsel with a long list of potential witnesses, including attorneys employed by the Florida Bar.[68]

When the hearing was convened, I introduced Mr. Chamberlin and Mr. Houston, and advised the referee that they would be assisting me in my defense. Mr. Chamberlin produced a written notice of appearance but because of his anticipated limited role, Mr. Houston did not. The Florida Bar counsel immediately objected to their participation, insisting that I had to conduct the proceeding myself. He further objected that I intended to call Mr. Chamberlin as a witness,[69] and that he could not both serve as a witness and counsel. The referee of-

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67. Mr. Houston had only minimal familiarity with the matter and no knowledge of the legal technicalities involved.

68. Important to establish the basis for the delay in initiating the proceedings and to determine whether Barnett Bank or the Securities and Exchange Commission had been improperly involved therewith.

69. And that if I did not, he would.

fered me a choice as to how I was to use Mr. Chamberlin, and I indicated that I needed him to cross examine Mr. Bremer.[70] The referee than asked the Florida Bar counsel if he intended to call Mr. Chamberlin as a witness, and he indicated that he would call him as a rebuttal witness. Based on such stated intention, the referee ruled that Mr. Chamberlin could not represent me and ordered him from the room. Florida Bar counsel renewed his objection as to Mr. Houston, but the referee indicated that if Mr. Houston entered a written notice of appearance, he could proceed, without a continuance.

The exclusion of the Mr. Chamberlin from the trial based on a motion by the Florida Bar claiming that it intended to call such counsel as a rebuttal witness[71] violated my rights to due process guaranteed by the United States[72] and Florida[73] Constitutions. Such exclusion was

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70. He was critical in that role, since he was fully familiar with all our planned rebuttal, so that, if forced to elect, I had to have him as my attorney.

71. Which it failed to do and never discussed with such counsel.

72. See amendments Five, Six and Fourteen to the United States Constitution.

critically prejudicial.[74]

The Florida Bar presented five witnesses at the final hearing: Bremer, Richmond, Caruncho, the attorney who presided at the grievance committee hearing, and a purported expert.

Bremer's testimony conflicted with his prior affidavits, with the testimony of numerous witnesses to the

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73. Due process is guaranteed by Section One, Article Nine of the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Nine and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (1960). The guarantees provided in Section One, Article Sixteen, were available to me in Florida Bar disciplinary proceedings, see, e.g., *Weathers v Davis, 196 So. 487 (1940).*

74. Such prejudice was impliedly admitted in the Florida Bar's brief to the Supreme Court, where it criticized the Petitioner's conduct of the hearing in not calling rebuttal witnesses or introducing exculpatory evidence.

Securities and Exchange Commission (including, most notably, Gary Granai), and with the information in transcripts of his own taped conversations. Bremer also testified that at the closing, no one, including me, believed that anything improper was being undertaken.

Richmond's testimony provided no support for the Florida Bar; however, he indicated that I had arrived at the closing late, and only then provided the so called disbursement letter. He further testified that such disbursement instructions had already been provided to Barnett Bank by Bremer, Granai or Gallagher.

Joe Caruncho, who had assisted Gallagher, Bremer and Granai, to prepare for a closing on the morning of April 19, 1985, by preparing a pre-closing checklist, testified that he thought the closing occurred at our offices that morning (*there is no dispute that he was mistaken, since the closing took place the following Monday, at Barnett Bank*), and that because Warehouse had counsel present, he assumed that we were representing the underwriter. However, on cross examination he admitted that prior to that Friday, he had never heard of

Warehouse (despite the fact that we had weekly staff meetings at which all pending firm projects were discussed); that no one had specifically indicated to him that my firm was representing the underwriter; and, that his role had involved no substantive review of any materials, rather, it was limited to preparation of a list of documents that the underwriting agreement indicated would be provided at the closing. More importantly, he testified at the Florida Bar Final Hearing that Bremer or Granai had promised to provide a certificate or something verifying that the Bremer indictment had been dropped and that I had always instructed my legal staff to assure that full and complete disclosure of all material matters had to be provided in all Securities and Exchange Commission matters.

The presiding officer of the grievance committee admitted that he had not seen the complaint until recently, but that, although his memory was dim, the complaint seemed to reflect the recommendations of the grievance committee.

The Florida Bar's expert witness testified that:

1. Underwriter's counsel was an expert, as that term was defined for purposes of exhibit 24 of Item 601 of Securities and Exchange Commission Regulation SK;
2. As a condition to the use of such counsel's name in a prospectus, such counsel was required to file a consent to the use of his name in a registration statement;
3. Because of such status and the consent requirement, counsel to the underwriter could not be replaced without an amendment to the registration statement.

Based on such testimony, the expert concluded that since no amendment disclosing a change in underwriter's counsel had been filed, I had remained as underwriter's counsel throughout the offering, and as an expert, was responsible for monitoring the offering and, either forcing the registrant to file amendments I deemed appropriate, or notifying the Securities and Exchange Commission that the issuer and underwriter might be in violation of securities laws.

Such testimony was contradicted by Securities and Exchange Commission Rule 436(e), which provided that: "*"Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity.*" Indeed, it has been uniformly recognized that, except for the matters dealt with in legal opinions filed as exhibits to registration statements, legal counsel involved in a public offering are not experts for purposes of registration statement liability.[75] It is indisputable that

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75. See the Florida Bar's 1987 continuing legal education program publication entitled Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys, *at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.*

See also, Association of the Bar of the City of New York, Report by Special Committee on Lawyer's Role in Securities Transactions, *32* The Business Lawyer *1879 (1977); Cooney,* The Registration Process: The Role of the Lawyer in Disclosure, *33* The Business Lawyer *1329 (1978); Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law,* SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37 The Business Lawyer *915 (1982); and,* Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), *35* The Business Lawyer *605 (1980).*

my firm neither filed any consents to the use of its name nor prepared, provided or filed any opinions concerning the Warehouse offering with anyone.[76]

Over my objections, the referee permitted introduction of the final judgments in the Warehouse injunction and 2e cases, both of which should have been excluded because they involved lower standards of proof. The referee, based on the objections of Florida Bar counsel excluded large quantities of evidence that I sought to introduce, including all evidence involving the Gallagher case,[77] and, all evidence involving the ethical standards for attorneys in securities matters published by the American Bar Association and the Association of the Bar of the City of New York. In addition, because the Florida Bar counsel was unable to obtain copies of the

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76. Such fact was admitted by the Securities and Exchange Commission during oral argument before the United States Court of Appeals for the Eleventh Circuit in the case of Gallagher & Company v Securities and Exchange Commission.

77. Including the admission by the Securities and Exchange Commission that I had provided no closing opinions.

Bremer tape transcripts directly from the Securities and Exchange Commission, he did not permit the filing of copies thereof that I had obtained from the Gallaghers.

Because he was totally unfamiliar with the case and had never spoken to any of the witnesses Mr. Chamberlin intended to call, my legal counsel only called one witness, me. Consequently many rebuttal witnesses to Mr. Bremer's testimony (*e.g.*, Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer) were never called to testify, Their examination, and an examination of the financial reports for Messrs. Jenkins, Baldrica and Scherer would have clearly demonstrated that Bremer's testimony that I assisted or attempted to assist in locating loans to effect a fraudulent closing was totally false. In addition, being unprepared and unfamiliar with the applicable law, Mr. Houston failed to rebut the testimony of the Florida Bar's expert through use of the text of Securities and Exchange Commission rules 436(e) or 478, or the Florida Bar's own materials from the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Direc-*

tors, Officers and Attorneys.

I specified at the Final Hearing that Mr. Chamberlin was essential to the cross examination of Bremer.[78] Had Mr. Chamberlin been permitted to act as counsel to me, he would have, on cross examination of Mr. Bremer, introduced the affidavits filed by Mr. Bremer in the injunction action against me.[79] Bremer provided the Securities and Exchange Commission with three separate affidavits for use in the Warehouse litigation; however, the Securities and Exchange Commission withheld the first affidavit provided by Bremer because it authenticated the Bremer tapes which the Securities and Exchange Commission wanted to exclude from consideration in conjunction with its motion for summary judgment.[80] The affidavits were included in the joint ap-

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78. See pages 7 and 8 of the record of the Final Hearing.

79. With which Mr. Chamberlin, but not Mr. Houston, was totally familiar.

80. As did Bar Counsel in the Florida Bar Case. Those are the same transcripts that the Securities and Exchange Commission was supposed to deliver through Bar Counsel for the hearing, at the instruction of the referee to Bar Counsel, but failed to provide.

pendix filed by me with the United States Court of Appeals for the Second Circuit in *Securities and Exchange Commission v Calvo*, 891 F.2d 457 (2d Cir. 1989), at pages A486 through A491 (the "Third Bremer Affidavit"), A685 through A713 (the "First Bremer Affidavit") and A714 through A727 (the "Second Bremer Affidavit"). A review of excerpts therefrom demonstrates material differences between them and between them and the testimony of Bremer at the Final Hearing. For illustrative purposes:

(a) Paragraph 6 of the Second Bremer Affidavit and Paragraph 16 of the First Bremer Affidavit admit that I was only involved with post effective amendment number one to the Warehouse registration statement.[81]

(b) Paragraph 16 of the First Bremer Affidavit admits that I was never counsel to Warehouse.[82]

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81. There were three subsequent post effective amendments filed with which I was not involved. The last such post effective amendment was the one declared effective.

(c) Paragraphs 24 and 25 of the First Bremer Affidavit authenticate the Bremer Tapes.

(d) Paragraphs 32, 33 and 34 of the First Bremer Affidavit and paragraphs 15 and 16 of the Second Bremer Affidavit concerning knowledge of the correct closing date were totally contradicted by Bremer's testimony at the Final Hearing where he first claimed no one knew about the erroneous closing date, and then, when cross examined as to his discussion of the proper closing date with Manuel Crespo of the Securities and Exchange Commission (and shown his taped transcript of the call), changed his story to indicate that Francesca Daniels had calculated the proper closing date in my presence.[83]

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82. The Florida Supreme Court found, without support in the record other than the erroneous testimony of the Florida Bar's expert (see Securities and Exchange Commission rules 436[e] and 478), that I represented all of the parties.

83. Denied by Ms. Daniels in an affidavit.

(e) Paragraphs 38 through 42 of the First Bremer Affidavit and paragraphs 21 and 22 of the Second Bremer Affidavit discuss my purported role in assisting Bremer to raise emergency loan funds through Messrs. Jordan and Burckhardt and Ms. Daniels, starting in January of 1985, indicating that I had suggested such loans.[84] At the Final Hearing, Bremer admitted that Messrs. Jordan and Burckhardt and Ms. Daniels had been introduced solely in conjunction with solicitation of legitimate broker dealer participants in the offering (as contrasted with his claims in paragraphs 40 and 42 of the First Bremer Affidavit), and further, that Bremer conceived of the loan plan himself, and, never discussed it with me; rather, he claimed that his attorney, Granai explained the proposed Bremer

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84. Such claims were denied by Messrs. Jordan and Burckhardt and Ms. Daniels in affidavits filed in the Injunction Action.

stock purchases to me on April 19, 1985.[85]

(f) In paragraph 55 of the First Bremer Affidavit and paragraph 29 of the Second Bremer Affidavit, Bremer discusses the Rolands lunch with no mention of Paul C. Jenkins having been introduced by me as a potential lender. He also admits that I was accompanied by Nina Gordon, an attorney employed by me.

(g) In paragraph 32 of the Second Bremer Affidavit, Bremer claims that he met with me during the afternoon of April 19, 1985, after lunch, however, at the Final Hearing he admitted that I had to leave lunch early because of appointments, and that he did not see me again until running into me at Shooters. No such meeting was reflected in the First Bremer Affidavit.

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85. Excerpts from the testimony of Mr. Granai to the Securities and Exchange Commission read into the record of the Florida Bar Case make it clear that the scenario described by Mr. Granai to me differed drastically from that described by Bremer.

(h) In paragraph 31 of the Second Bremer Affidavit Bremer admits that Richmond contacted the escrow agent directly on Friday, April 19, 1985, to confirm his receipt of funds from escrow, three days prior to delivery of my letter of disbursal instructions.

(i) In paragraph 46 of the First Bremer Affidavit, Bremer discusses the incident with Kolonosky at the closing, which he could not recall at the Final Hearing.[86]

(j) In paragraph 51 of the First Bremer Affidavit, Bremer admits that he and Granai flew to Florida on April 18, 1985, rather than earlier as testified to at the Final Hearing. In that paragraph he also admitted that there was a discussion of meeting use of proceeds requirements (although he, unlike Mr. Granai, Gal-

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86. That incident's sole purpose was to make me believe that the Warehouse offering was oversubscribed, and thus not to question the Bremer stock purchase. Had the Kolonosky stock purchase been accepted, then, as far as I knew, the minimum offering would have been exceeded excluding Bremer's stock purchase.

lagher and me, claimed such discussion was for deception purposes)[87] at an April 19, 1985 meeting in my offices, a discussion he flatly denied at the Final Hearing.

(k) In both the First Bremer Affidavit and the Second Bremer Affidavit, Bremer on several occasions reflects meetings with Beer,[88] who he claimed acted as "blue sky counsel" in the Warehouse offering. The Bremer tapes disclose that Beers' partner Wilkes was informed by Granai in early May of 1985 that the offering closed short, however, in paragraphs 75 and 76 of the First Bremer Affidavit, Bremer claims that Beer was shocked to discover such

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87. Since the story appears to have been told only to Mr. Gallagher and me, we had to have been the targets of that deception.

88. The attorney who as of the September 24, 1984 retainer letter with Bremer, replaced my firm in the Warehouse offering. An investigation of the Warehouse matter examining correspondence from the Beer firm to the National Association of Securities Dealers, Inc., and Securities and Exchange Commission, on behalf of the underwriter, would make his role obvious.

fact during a June 13, 1985 meeting, immediately after which he retained attorney Kaplan and, together with Beer, contacted the Justice Department and Securities and Exchange Commission.

(l) In paragraph 79 of the First Bremer Affidavit Bremer claims that I was told about his indictment but was unconcerned (he also testified to that effect at the Final Hearing);[89] *however, in paragraph 47 of the Second Bremer Affidavit, Bremer swore that I "had expressed the opinion that a post effective amendment should be filed disclosing my [Bremer's] indictment, and that I [Bremer] should resign from Warehouse." Furthermore, in paragraph 48 of the Second Bremer Affidavit, Bremer admits that he agreed to resign.*

Such drastic differences as to material facts make it clear that Bremer lied on numerous occasions, and that

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89. That was clearly the conclusion of the Florida Supreme Court in the Florida Bar Case.

when considered with the consistency of my testimony and the prior testimony of the Gallaghers and Granai, and, the affidavits of Messrs. Jordan, Burckhardt, Jenkins, Baldrica, Scherer and, on two occasions, Ms. Daniels, my version of the events is the most credible.[90] It also makes it clear that Bremer's testimony at the prior Warehouse proceedings was unreliable, casting significant and material doubts on the results thereof and on the conclusions based thereon.

Most important of all, in paragraph 52 of the First Bremer Affidavit, Bremer flatly admits[21] *that I believed that*

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90. If I had been a participant in the Bremer conspiracy, I certainly would not have objected to the exclusion of the Bremer indictment from Granai's opinion, or, as testified to by the Florida Bar's witness, Caruncho, suggested that Bremer provide a certification that it had been dropped; I would not have differentiated the treatment of Richmond (as opposed to the other lenders) in the disbursal instructions; I would not have suggested the Granai trust arrangement, or thereafter, written to Granai asking that the promised documents be provided to Gallagher so that Granai could disburse the offering proceeds held in trust; or, I would not have advised Gallagher that Gallagher could not sell out the huge Bremer stock position, except in reliance on the dribble out provisions of Securities and Exchange Commission Rule 144.

91. Confirming the assertions in the Granai deposition that I was certain that the Bremer stock purchase was legal, and, confirming Bremer's testimony at the Final Hearing

the purchase of stock by Bremer (as explained to me) was unequivocably legal.

Mr. Chamberlin was not a witness to any facts material to the proceeding nor did he have any knowledge thereof, except as obtained when acting as legal counsel to me during the appeal of the injunction and the 2e proceeding, or to the Gallaghers, thus, he could not have provided any testimony at the Final Hearing unless the Gallaghers and I waived our rights to attorney client privilege. Because we did not, there was no basis for the use of Mr. Chamberlin as a witness by the Florida Bar, and, in fact, the Florida Bar never called Mr. Chamberlin as a witness or even interviewed him with that possibility in mind.[92]

I was severely prejudiced by my inability to use Mr.

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that, at the closing, I did not believe that anything improper was being undertaken. Consequently, at most, the Florida Supreme Court should have found that I misunderstood or mis-analyzed the Bremer proposal, as described to me by Granai.

92. The referee made no inquiry as to what evidence Mr. Chamberlin was to provide on behalf of the Florida Bar.

Chamberlin's services, specifically, in that I was left with Larry D. Houston, who had never interviewed any witnesses and was unfamiliar with the facts or law involved,[93] to conduct my defense.

I have a right to due process guaranteed by the Fourteenth, Sixth and Fifth Amendments to the United States Constitution, and by Sections Two, Nine and Sixteen of Article One of the Florida Constitution, which included the right to representation by counsel, in the Florida Bar Case. That right was violated,[94] and con-

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93. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (1960).

94. I was also not represented by counsel at the grievance committee hearing because the Florida Bar refused to grant a short continuance permitting attendance by my attorney. The only continuance in the Florida Bar Case granted to me was during the pendency of my successful appeal of the referee's decision limiting issues at trial. All of my other requests for postponements, even in the interests of clients facing federal criminal proceedings were rejected, while postponements to meet the Florida Bar's vacation schedule were liberally granted.

sequently such proceedings should have been considered a nullity.[95]

On December 7, 1992, the referee found me guilty of every allegation made by the Bar and recommended that I be disbarred, with all costs assessed against me.[96]

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95. *The right under the Florida Constitution to assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings, see Myles v State, 602 So.2d 1278 (1992). The case of Traylor v State, 596 So.2d 957 makes it clear that the evidence presented at the Final Hearing in violation of my right to representation by counsel is not competent evidence, and cannot be used to justify the Florida Supreme Court's decision in the Florida Bar Case.*

96. *All of the Florida Bar's costs were assessed against me, despite the fact that: (i) The Florida Bar's initial strategy of limiting issues at trial had been reversed by the Florida Supreme Court the previous year; (ii) The Florida Bar had been forced to drop a majority of the counts in its complaint against me when it found that they had not, in fact, ever been authorized, and would have violated my constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Florida Bar's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) The Florida Supreme Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2e proceeding. The Florida Supreme Court established the factors for assessment of costs in a case cited by the Florida Bar itself, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978). Such factors should have led to a determination that, even if the Florida Bar was successful in its case, each party should*

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Chapter Six: The Appeal

I filed detailed briefs requesting that the Florida Supreme Court reject the referee's decision and attempted to supplement the record with materials that, because of Mr. Houston's unfamiliarity with the case, had not been provided at the final hearing. They included affidavits from Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer refuting Bremer's testimony; the good standing certificate provided to me by the Florida Bar in 1990; and, excerpts from testimony and materials which the referee had improperly excluded at the final hearing.

On November 3, 1993, the Florida Supreme Court heard the case. The Florida Supreme Court was falsely led to believe by counsel to the Florida Bar during oral argument that I was offered a choice by the referee in the Florida Bar Case to either use G. Richard Chamberlin, Esquire, as a witness or as my attorney, and that I elected to use Mr. Chamberlin as a witness, although he was

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have borne its own costs. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions.

never called for such purpose. In fact, as demonstrated in the letter provided by Mr. Chamberlin to the Chief Justice immediately following the oral argument, when faced with such election I chose to use Mr. Chamberlin as my attorney; however, counsel to the Florida Bar indicated that he intended to call Mr. Chamberlin as a rebuttal witness, whereupon the referee disqualified Mr. Chamberlin and ordered him out of the room.[97]

On December 16, 1993, the Supreme Court, based almost exclusively on the Warehouse injunction decision, affirmed the referee's recommendations, finding that I represented all the parties in the Warehouse offering, that I was responsible for assuring the sale of the securities by April 7, 1985, and, that the expert's opinion concerning the applicable law was correct.

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97. My comments on page 8 of the record, lines 2 to 24, make it irrefutable that it was Mr. Whalen's stated intention of calling Mr. Chamberlin, as a witness, not the nonexistent election by me to do so, that led to his disqualification. The fact that I had formally and on a timely basis, prior to the hearing, advised the referee and Bar counsel that I intended to call him as a witness, did not impact the ability of the Florida Bar's counsel to participate in the proceeding.

On December 30, 1993, I filed a currently pending motion for rehearing based on numerous constitutional grounds, as well as the falsity of the comments made by the Florida Bar's counsel during oral argument. On February 10, 1994, the Supreme Court denied my motion, without comment.

Chapter Seven: Concluding Observations

I. Attorney Client Privilege

The Florida Supreme Court based its decision, in part, on a determination that my otherwise applicable duty of confidentiality, was superseded because the conduct of the participants in the Warehouse matter was criminal, regardless of whether or not a criminal proceeding was ever initiated. Bremer testified that at the closing, there was no intent by anyone to engage in any improper conduct, and that intent is a critical element in the commission of a crime.[98] Thus, not only has a criminal

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98. In essence the Florida Bar Case stands for the proposition that the attorney client privilege can be ignored if the attorney merely should have suspected that a client might not be telling the truth; whether or not the attorney, in fact, had such doubts!

action never been initiated, but the Florida Bar's own witness in chief has testified in a manner making such a determination inappropriate. All other participants in the Warehouse closing who have been subject to Securities and Exchange Commission proceedings have vigorously denied any wrongful intent. There is utterly no evidence indicating that I was aware that anyone intended to engage in criminal conduct, and therefore, the Florida Supreme Court's decision is wrong.[99]

II. Vulnerability of Victims

The Florida Supreme Court, addressing the issue of appropriate punishment, found the victims of the Warehouse closing to be especially vulnerable. The fact is that no evidence was introduced at the hearing by any purported victims. Without minimizing the seriousness of the fraud and misconduct perpetrated by Bremer (the

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99. The Florida Supreme Court indicated that I was obligated to notify investors of a number of facts, however, it ignored the fact that I could not, on my own, modify the Warehouse registration statement and that I had no way of knowing who the investors were. Furthermore, the timing involved and the overlapping hearing which the Florida Bar refused to reschedule made any such attempt impossible.

Florida Bar's chief witness), the fact is that there were no widows and orphans involved in the Warehouse matter. Investors in new issues are not vulnerable members of society, rather, securities laws as well as the know your customer rules of the National Association of Securities Dealers, Inc., wisely limit participation in new issues to sophisticated investors with substantial securities experience who, in addition, can afford the loss of their investment, a fact prominently reflected in the risk factor section of the registration statement.

A major portion of the non-Bremer investors invested through selected dealers who were licensed securities professionals and who were completely aware that the parties believed April 22, 1985, was the proper closing termination date. The bulk of the subscriptions, in fact, were submitted after April 7, 1985.

The Florida Supreme Court concluded that the Warehouse securities were worthless at the time they were issued. There was no support on the record for that conclusion. Rather, the facts demonstrate that from the time of closing until the termination of trading when the

Securities and Exchange Commission launched its actions, the Warehouse securities traded at a premium.[100] To this day, Bremer continues to claim that Warehouse was a legitimate company and presented investors with a reasonable investment opportunity.

The Florida Bar and its expert have taken the position that in making Warehouse related decisions, the only interest that should have been considered was protection of the new investors. However, Warehouse was an existing public company, with existing employees, and a large number of existing stockholders.[101] It would have been irresponsible to ignore their rights out of hand, and to have destroyed their company, if, in fact, there was a reasonable possibility that the factual allegations presented by Messrs. Bremer and Granai to Mr. Gallagher were accurate. In fact, if the factual allegations

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100. A small premium, unlike the wild overcharging that later permeated the penny stock market.

101. The Warehouse stockholders prior to the offering unaffiliated with Bremer were no more or no less vulnerable than those who invested during the 1984-1985 public offering.

presented by Messrs. Bremer and Granai to Mr. Gallagher were accurate and Mr. Gallagher had refused to close, then both Warehouse and its existing stockholders may well have had a cause of action against the underwriter for failure to use its best efforts to complete the offering.

III. The Florida Bar's Role

Perhaps the most incongruous aspect of the Florida Bar Case is the unrefuted fact that the Florida Bar played a direct role in the Warehouse closing fiasco. On April 22, 1985, the day of the Warehouse closing, the very same office of the Florida Bar that prosecuted the Florida Bar Case, had a date with me which it refused to break.

It is unfortunate that bureaucrats in general and the Florida Bar specifically have become so aggressive in their quest for victory that they disdain the courtesies attorneys normally grant each other. Those courtesies have permitted the efficient functioning of a judicial system where scheduling conflicts are the rule, rather than the exception. Such disdain, although technically unassailable, can have devastating consequences, like the

Warehouse case.

Whether or not I would have been able to more effectively participate in the Warehouse closing if I had been provided the time is speculative. Whether or not, given the brevity of available time, even if the Florida Bar had agreed to postpone its hearing on April 22, 1985, I would have elected to assume a role as underwriter's counsel is speculative. That I was not provided such opportunity, or the opportunity to engage in all of the due diligence and factual verification that the Florida Bar now claims was required, is not speculative. That the Florida Bar itself was the entity at least partially responsible for such failure is also not speculative.

While the Florida Bar cannot be blamed for the Warehouse fiasco, it is obvious that of all the agencies that have ever existed, it is most estopped from holding me responsible for that which it itself prevented me from doing.

IV. My Background

In reaching a decision in this matter and evaluating the veracity of the parties and witnesses, the Court should have noted that I have a history of striving for excellence in the practice of law and in my role in society.

My parents were unable to pay for my legal education, and, like many other minority lawyers, I worked my way through law school. I was a full time teacher, coached an equestrian team and headed two academic departments at the same time that I attended law school. Despite such additional responsibilities, I graduated in the top ten percent of my law school class with a substantial quantity of additional credit hours in topics I deemed important to my professional development.

Wanting to be the best possible lawyer, I thereafter immediately obtained an LLM degree, where I was again at the top of my class. While, at the time, Florida had no continuing legal educational requirements, I imposed them on myself and was designated in not one but two areas of the law.

I have always donated my time generously for the

benefit of my community and to assist those who cannot afford to pay for legal services. I was one of the featured speakers in the Florida Bar's program on corporate law in 1985, the year of the Warehouse closing, and during the twelve month period following the Warehouse closing, contributed more than $20,000 to help build the Greek Orthodox cathedral in Fort Lauderdale. Despite the pendency of the Florida Bar Case and the attendant demands on my time, I was a founding director of my local Kiwanis club, I served as the chairman and president of my county's parents' & schools' council and served on my local elementary school advisory council.[102] None of such activities were undertaken for purposes of generating professional clientele but rather, to comply with my perceived professional responsibilities to my community.

I also served as an unpaid presidential appointee to a United States Selective Service System Local Board[103]

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102. As a result of the decision in the Florida Bar Case, I have resigned from all such positions. However, I continue to make my time available to assist them on an informal basis.

103. An unpopular but critical job.

for years, both before and after the Warehouse matter.

These factors are not indicative of a person who takes his professional responsibilities lightly, or who meets the unprofessional profile in which the Florida Bar seeks to cast me; rather, they confirm the uncontested testimony of the many persons whose testimony on my behalf was presented to the referee in the Florida Bar Case.[104]

V. Improper Emotional Appeal to Ethnic Background

The referee in the Florida Bar Case found it important to make a factual finding that I am Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Florida Bar[105] have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual

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104. Although such testimony was totally ignored.

105. The Florida Bar cited numerous cases involving conviction of attorneys for narcotics crimes that had utterly no relevance to the proceeding, other than prejudicing the reader against Colombians by implying that we are all drug dealers.

nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and the Florida Supreme Court should not have aligned itself with such blatant impropriety; especially when the Florida Supreme Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!

VI. Mitigating v Aggravating Circumstances

The Florida Bar, for the first time, during closing arguments, raised the issue of supposedly aggravating circumstances that justified the severe penalty of disbarrment. That issue was not only not plead in the Florida Bar Case, but no evidence in support thereof was properly introduced at the hearing. In fact, such allegation and argument was totally refuted by the only testimony on point, that being the testimony of Messrs. Stein, Lipson and Vogel, Father Nicholas Nick and Mrs. Laura Gallagher as to my impeccable good character, honesty and integrity; and, the admissions on cross examination by the Florida Bar's witnesses, that I had always insisted on full disclosure, never counseled im-

proper conduct and that, in Bremer's case, as reflected in his taped, post closing telephone conversations, that I would never permit anyone to do anything wrong. Indeed, Bremer's taped conversations with his attorney, Granai, after he had gone to the Justice Department, make it clear that, when I first came to suspect that anything might have been wrong with the Warehouse closing, my advice was that trading in Warehouse stock had to be stopped. Again, there was no support for the Florida Bar's argument in the record, and in fact, the evidence was overwhelmingly to the contrary. In addition, I (to my detriment in light of the loss of my materials by the Florida Bar), completely and promptly cooperated with the Florida Bar in its investigation of the Florida Bar Case; and, my state of mind was certainly unusually distracted by the pendency of the Florida Bar's hearing on the date of closing.

The Florida Supreme Court's conclusion that Warehouse was not an isolated instance is contrary to the evidence, especially in light of the excerpts from Bremer affidavits included as an exhibit to the Pending Motion

for Rehearing. All improprieties alleged occurred, if ever, during the period surrounding the weekend of April 19 through 22, 1985. No evidence of other similar acts was introduced.

In light of the foregoing, a weighting of mitigating versus aggravating factors clearly tilted materially in my favor.

VII. Reformation

Even if I had been provided all my constitutionally guaranteed due process rights, if repealed Disciplinary Rule 1-102(A)(6), remained a viable predicate for Bar actions, and, if the evidence at the final hearing supported a conclusion that I had violated Disciplinary Rule 1-102(A)(6), the Florida Supreme Court's conclusions regarding discipline would not be warranted. It would be unfair to subject me to discipline in addition to that already imposed by the Securities and Exchange Commission in the 2e proceeding, which was completed during July of 1990, more than three years ago. Under applicable Securities and Exchange Commission law, the Warehouse matter is no longer even a ripe disclosure

item as a result of the passage of time since the issuance of the Warehouse injunction, more than six years ago.

The Florida Bar introduced absolutely no evidence of any wrongdoing of any kind by me since conclusion of the Securities and Exchange Commission sanction period. On the contrary, all of the evidence affirmatively and forcefully asserted that I am an honorable and competent attorney and productive member of my community. The Florida Bar's inexcusable delays should not be permitted to again destroy my life, reputation and practice. If Bar discipline is imposed for the purpose of protecting the public or to rehabilitate, then none can be said to have been called for.

Respectfully submitted, this 8th day of May, 1994.

\s\William A. Calvo, III\s\

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(6)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

WILLIAM A. CALVO, III,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Florida

BRIEF IN OPPOSITION

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OTHER AUTHORITIES

State Constitutions and the Protections of Individual Rights, 90 Harv. L. Rev. 489 (1977) 20

SUMMARY OF ARGUMENT

The petitioner was disbarred after having been found, in a full evidentiary hearing, to have participated in fraud and other inappropriate acts relating to securities sales. The petition fails to establish the jurisdiction of this Court and raises no substantial federal question. The petition fails to comply with the requirements of Supreme Court Rule 14.1(h) that the Statement of the Case specify the stage in lower court proceedings at which the federal questions were raised, the method or manner of raising them, their disposition by the lower courts and the specific places in the record which reflect that the federal question was timely and properly raised.

DUE PROCESS

The language of the challenged rule is not unduly vague. It meets the criteria established by this Court when it upheld equally general provisions on the basis of established authoritative interpretation and the existence of traditional codes of behavior. In addition, there is no overbreadth doctrine applicable to vagueness analysis and the conduct of the petitioner was clearly unacceptable by any standard.

The petition does not establish that there was a denial of assistance of counsel. The petitioner was represented by counsel at the evidentiary hearing and the Referee acted within reasonable discretion in refusing to permit an additional attorney who was a potential witness.

The petitioner received adequate notice of the evidentiary hearing. There is no constitutional requirement that the petitioner receive notice of a filing of a complaint against him with a grievance committee or notice of the grievance committee's decision prior to the committee filing specifications against the attorney.

The petition fails to disclose any constitutional violations with respect to the Referees' evidentiary and discovery rulings.

EQUAL PROTECTION

The petition fails to establish any basis for the assertion that the assessment of costs against the petitioner was based upon a different standard than such assessment against others because of the petitioner's national origin.

The mere fact that the petitioner was enjoined under federal securities laws from engaging in a securities practice and also disbarred by The Florida Bar did not constitute cruel and unusual punishment. No other basis for concluding that the disbarment was cruel and unusual is cited in the petition.

The Referee's reference to the petitioner's place of birth in his general discussion of the petitioner's biographical background, with no further reference to national origin in the opinions of either the referee or the Florida Supreme Court, fails to establish prejudice based upon national origin.

EX POST FACTO

The rule under which the Petitioner was disbarred is not an ex post facto law as prohibited by the United States Constitution. First, the rule is not penal in nature. Second, the conduct for which the petitioner was disbarred occurred at a time when the rule was in effect. Third, while the rule was changed, the same conduct continued to remain a basis for disbarment after the change.

FEDERAL SECURITIES LAWS

The Court need not address the issue of construction of federal securities laws since neither the Referee or the Florida Supreme Court based their decisions upon federal law. The petitioner was disbarred for committing acts which violated Florida's rules of professional conduct.

DEFERENCE TO STATES

The Court has recognized that states have an important interest in maintaining and assuring the professional conduct of attorneys which they license. Accordingly, the Court has extended considerable deference to states in the administration of attorney discipline.

ARGUMENT

This case involves an attorney's disbarment for his direct, knowing, participation in securities fraud. Mr. Calvo received a full evidentiary hearing, with adequate notice, and was represented by counsel throughout the

proceeding. There is nothing unusual about the case and there are no federal constitutional issues bearing upon it.

In his report recommending that Mr. Calvo be disbarred, the Referee, after a full evidentiary hearing, found that:

> [T]he respondent acted with reckless disregard for the safety of the investors' money when he authorized and participated in the closing as attorney for the underwriter approximately two weeks after the deadline.
>
> * * *
>
> Respondent knew that short term loans had been arranged with several individuals who had no intention of purchasing stock. * * * The net result of this was that the company received, from the offering, approximately $130,000 and not the $964,000 specified in the prospectus. * * * These loans did not constitute proceeds of bona fide sales of stock to public investors, but actually constituted a fraud on legitimate investors.
>
> * * *
>
> Respondent fraudulently, with others, extended the offering period beyond the time specified. He, with others, obtained short term loans which inflated the number of shares allegedly sold. The loans were then repaid almost instantaneously with huge profits to the lenders. Neither of these events were ever disclosed to the investors.
>
> * * *
>
> In March, 1985, prior to the closing on April 22, 1985, Edward W. Bremer, President, director

> and principle (sic) stockholder of Electronics Warehouse was indicted in Maryland on seventeen counts of mail fraud. Respondent and the underwriter were advised about it but failed and neglected to supply this information to investors. * * * Authorizing and participating in the closing without making this disclosure was reckless and a breach of respondent's duty to investors.

[App. I, pp. 12-19]

The Florida Supreme Court found that the findings of the Referee were supported in the record by competent substantial evidence and disbarred Mr. Calvo.[1]

The petitioner takes a "shotgun" approach in which he raises a myriad of alleged constitutional violations, misconstrues the basis of much of the Referee's findings and the Florida Supreme Court's decision, and fails to cite anything in the record which would raise a substantial federal question.

I

The petition fails to establish that the constitutional issues were properly raised below.

An essential requirement for jurisdiction under 28 U.S.C., § 1257 is that a substantial federal question have been properly raised in the state court proceeding.

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[1] This Court has held that, with a few exceptions not relevant here, it will not exert its jurisdiction merely to review a decision of a state court upon a question of fact, and will not reexamine the state court's findings and conclusions of fact. *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397 (1913).

Accordingly, Supreme Court Rule 14.1(h) requires that the petitioner seeking review of a state court decision specify in the statement of the case:

> * * * the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears * * * as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Mr. Calvo failed to comply with *any* of the above requirements of Rule 14.1(h).

Petitioner's failure to comply with Rule 14.1(h) is critical because it is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

The Florida Supreme Court opinion makes only passing reference to a constitutional issue, stating that they "reject Calvo's contention that he was denied due process rights and that he cannot be disciplined under the rules of ethics in effect in 1985, which have been superseded by the new Rules Regulating The Florida Bar." This singular

reference to a constitutional question refers to only one of Mr. Calvo's arguments and fails to indicate the nature or manner in which the argument was raised at the trial level or the appellate level. Mr. Calvo's petition fails to establish that any of his constitutional arguments were ever properly preserved below. On this basis alone, the petition should be denied.

II

The petition fails to establish the existence of any substantial federal question relating to denial of due process.

Under the heading of due process, petitioner asserts that the regulation under which he was charged was unduly vague and an unconstitutional ex post facto law, that he was denied assistance of counsel and adequate notice, and that he was denied an adequate opportunity to engage in discovery and introduce evidence. He fails to provide support in the record for any of these claims.

A. Vagueness

The petition contends that former DR 1-102(A)(6), Fla. Bar Code of Pro. Resp., which Mr. Calvo was found to have violated, is too vague to meet constitutional requirements. The Rule provides that "[a] lawyer shall not * * * engage in any other conduct that adversely reflects on his fitness to practice law." The degree of specificity that the vagueness standard requires varies according to the nature of the statute and the need for fair notice or protection from unequal enforcement. *Village of Hoffman Estates, Inc. v. The Flip Side*, 455 U.S. 489, 498, 102

S.Ct. 662, 71 L.Ed.2d 362 (1982). This Court dismissed a claim of vagueness by a disciplined lawyer in the case of *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985), where the language of the challenged rule was at least as general as is the rule at issue in this case. The *Snyder* case involved Federal Rule of Appellate Procedure 46, which permits an attorney to be suspended or disbarred for "conduct unbecoming a member of the bar of the Court." In upholding the rule, the Court stated:

> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. * * * Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

Id. at U.S. 645. For purposes of vagueness analysis, there is no meaningful distinction between "conduct unbecoming a member of the bar" and "conduct that adversely reflects on his fitness to practice law." The Florida rule must also be read in light of the "complex code of behavior to which attorneys are subject" and the case law, applicable court rules, and "lore of the profession."

There is an additional important reason, articulated in *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 3039, 41 L.Ed.2d 1033 (1974), that the challenged rules meet vagueness

requirements. In *Parker*, the Court rejected a vagueness challenge to Articles 133 and 134 of the Uniform Code of Military Justice which proscribe "conduct unbecoming an officer and a gentleman," and "all disorders and neglects to the prejudice of good order and discipline in the armed forces." As in the case at bar, the petitioner in *Parker* had engaged in conduct that was clearly unacceptable. Nevertheless, he argued that the wording of the statute was unduly vague in general, thus attempting to introduce an overbreadth doctrine into the vagueness test. In addition to finding that the provisions, like the rule challenged here, were defined by a body of authoritative construction, the Court declined to apply an overbreadth doctrine to vagueness analysis. Referring to several cases it had analyzed, the Court stated:

> None of them suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Id. at U.S. 756.

The challenged provision must not be read in a vacuum, but with due consideration of the acts of which the petitioner has been found guilty. The Referee found that Mr. Calvo acted with "reckless disregard for the safety of investors' money" and that he had participated in a "fraud on legitimate investors." Regardless of what other

conduct might be included within the scope of the challenged rule, it is surely clear to any attorney that the conduct described in the Referee's findings is not consistent with fitness to practice law.

Petitioner also argues that imposition of discipline pursuant to DR 1-102(A)(6) violated the constitutional prohibition of ex post facto laws.[2] In the first place, the prohibition of ex post facto laws applies only to criminal or penal provisions. *Re Sawyer*, 124 U.S. 200, 8 S.Ct. 482, 31 L.Ed. 402 (1888); see also *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Bar disciplinary provisions are not criminal or penal in nature. They are designed to ensure that attorneys meet minimum levels of fitness deemed necessary to adequately perform their function. *Clulow v. Oklahoma*, 700 F.2d 1291, 1297-98 (10th Cir. 1983), overruled in part on other grounds sub nom., *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984); *DeBock v. State*, 512 So. 2d 164 (Fla. 1987); In *DeBock*, the court explained:

> To strike the unworthy lawyer from the roll is not to add to the pains and penalties of the crime. The examination into character [as in the examination prior to admission] is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment. We reaffirm our holding . . . that bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts. . . . For

---

[2] Mr. Calvo includes this argument under the category of due process. He makes another ex post facto argument under a separate point in the petition which will be dealt with below.

> these reasons, the vast weight of judicial authority recognizes that bar discipline exists to protect the public, and not to "punish" the lawyer.

Id. at 166-167 (citation and footnote omitted).

Even if the challenged disciplinary rule were deemed to be criminal, its application to Mr. Calvo would not violate the ex post facto prohibition. This Court has defined an ex post facto law as:

> * * * one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage;"

Id. at U.S. 45-46.

Mr. Calvo was not disciplined pursuant to an ex post facto law. The challenged rule was in effect at the time he committed the acts for which he was disbarred and there were no changes in the nature of possible discipline or the quantum of evidence required. The only change was that the Florida Supreme Court restructured the bar's rules of professional conduct. The commission of fraud by an attorney was an ethical violation sufficient to result in disbarment at the time of Mr. Calvo's actions and has remained so since. According to petitioner's untenable definition of ex post facto, every lawyer who had committed an infraction was immediately exonerated when the Florida Supreme Court repealed the old ethical code and adopted the new one.

B. Assistance of Counsel

Mr. Calvo asserts that he was deprived of assistance of counsel because the Referee excluded Mr. Calvo's trial attorney on learning that he was a potential witness. Mr. Calvo admits that he had retained two attorneys to represent him at the hearing, and that one of them did do so. He contends, however, that such counsel was retained to handle only a particular aspect of the hearing and that he was "forced to conduct the defense, without any continuance," despite the fact that he was not prepared to do so. [Petition, p. 34] Thus, the due process right which he asserts is not a right to counsel, but a right to a particular lawyer to handle a particular portion of the hearing. This Court has never recognized such a right. To the contrary, the Court has recognized that, even as to the Sixth Amendment right to counsel, courts have the discretion to exclude particular lawyers under appropriate circumstances, including conflicts of interest. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In so holding, the Court stated:

> We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial " [citation omitted], and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." [citation omitted] Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to

> guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. at U.S. 159.

With respect to his counsel having to proceed without a continuance, Mr. Calvo fails to cite any record support for the fact that he requested that the Referee grant a continuance and was denied it, and that he raised a federal constitutional issue before the Referee.

C. Notice

Mr. Calvo argues that he was denied his due process right to receive adequate notice, citing *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). *Fuentes* simply holds that notice and hearing "must be provided before the deprivation at issue takes effect." *Id.* at U.S. 82. It is undisputed that Mr. Calvo received a full hearing before his disbarment, and that he received substantial notice prior to that hearing. The notice which Mr. Calvo refers to is his failure to receive notice of the filing of a complaint against him until it was referred to a grievance committee, and his failure to receive notice of the grievance committee decision until specifications were filed against him. The Bar's failure to provide such notices is completely irrelevant to any federal constitutional right.

Petitioner also complains about the substantial lapse of time between the grievance committee's authorization for the Bar to proceed and the filing of specifications by the Bar. Mr. Calvo cites no authority for the proposition that such a delay implicates a federal constitutional right,

and this Court has never recognized a constitutional "statute of limitations" on the filing of disciplinary proceedings against lawyers. In addition, the Referee, while weighing the delay as a mitigating factor in Mr. Calvo's favor, found that, "[R]espondent has substantially contributed to the delay and has not demonstrated specific prejudice resulting from the delay." [App. I, p. 22] The only prejudice alleged in the petition is that "potential witnesses had disappeared or were outside of the Referee's jurisdiction." No record support is cited for the assertion.

D. Discovery and Evidence

The petitioner complains that he was unable to obtain certain materials from the Securities and Exchange Commission, that the Bar failed to provide certain information and had lost other information, and that the Referee made improper rulings regarding the admission of various items of evidence. Needless to say, every ruling by a state judge or hearing officer regarding discovery and admissibility of evidence is not reviewable by this Court. As with his other points, Mr. Calvo fails to describe with any detail the nature of the discovery information denied him and the evidence ruled upon, and fails to make a record showing that any federal constitutional issue was implicated and preserved.

III

The petition fails to establish that Mr. Calvo was denied equal protection rights.

The petitioner claims that his right to equal protection was violated by the imposition of costs against him, by the application of disciplinary standards in his case, and by reference to his Colombian ancestry. He fails to establish a basis for granting certiorari as to any one of these claims.

A. Costs

Mr. Calvo argues that the Florida Supreme Court applied a different standard to him when it assessed costs against him than it applied in *The Florida Bar v. McCain*, 330 So. 2d 712 (Fla. 1976), when it assessed no costs against the attorney disciplined in that case. Mr. Calvo concludes, with no effort at substantiation, that the difference was based upon his membership in a minority class.

Under Florida law, the imposition of costs in a disciplinary proceeding is left to the discretion of the referee. *The Florida Bar v. Chilton*, 616 So. 2d 449, 451 (Fla. 1993); *The Florida Bar v. Miele*, 605 So. 2d 866, 868 (Fla. 1992); *The Florida Bar v. Carr*, 574 So. 2d 59 (Fla. 1990). Generally, Florida law provides that when there is a finding that an attorney has been found guilty of violating a provision of the ethical rules, the bar should be awarded its costs. *The Florida Bar v. Davis*, 419 So. 2d 325, 328 (Fla. 1982). However, the referee and the Supreme Court may consider various circumstances in deciding whether or not to make such an award. *Id.* The standard the court considered in *McCain* was whether the referee abused his discretion as

to the issue of costs. Mr. Calvo cites nothing in the record to suggest that the Referee or the Florida Supreme Court assessed costs against him according to a different standard than they have been assessed against others, and that if they did do so, it was because of Mr. Calvo's national origin.

B. Right to Non-Arbitrary, Cruel or Unusual Punishment

Mr. Calvo claims that the imposition of discipline on him constitutes cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution. Inasmuch as the discipline of disbarment is not a punishment, the Eighth Amendment has no application. *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 65 S.Ct. 591, 92 L.Ed.2d 628 (1948).

Even if such discipline were considered punitive, Mr. Calvo has failed to establish a sufficient federal question or conflict with this Court or other courts as applied to him. The only specific act mentioned by Mr. Calvo as cruel and unusual is that the discipline of disbarment was unfair as a "multiple punishment," apparently in light of the SEC's independent imposition of sanctions against him. Nothing in the petition explains how the SEC and Florida Bar actions constitute multiple punishment in violation of the United States Constitution. The two proceedings served entirely separate purposes, neither of which is punitive in nature. Even if both proceedings had been criminal, the United States Constitution permits separate punishment for the same acts if they violate both

federal and state laws. *Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

C. Prejudice Based on National Origin

Mr. Calvo seizes upon a single reference in the Referee's findings to his nation of birth as evidence that the entire proceeding was corrupted by prejudice. The reference is located in a short paragraph giving Mr. Calvo's biographical background, followed by a chronology of his education and professional experience. [App. I, p. 20] There is no other reference to the petitioner's national background in the Referee's report and Mr. Calvo cites no reference anywhere else in the record. At no point in the Referee's findings or recommendations was his place of birth discussed as either an aggravating or mitigating circumstance for purposes of imposition of discipline. Mr. Calvo does not offer any record evidence to support the bald allegation that his national origin had any bearing upon the proceedings or the disbarment.

IV

The petition fails to establish that the disbarment of Mr. Calvo constituted an application of an ex post facto law.

Petitioner argues that he was subjected to an ex post facto law because the Referee and the Florida Supreme Court supposedly relied upon expert testimony which interpreted federal securities laws differently than they

had been interpreted in a continuing legal education seminar sponsored by the Bar.

Petitioner's point is misplaced for three reasons. First, as noted above, the ex post facto prohibition applies only to criminal or penal provisions, which bar disciplinary measures are not. Second, Mr. Calvo's entire argument is premised upon a continuing legal education seminar outline that was prepared by another practicing attorney. The outline is not a legislative enactment such that a subsequent Supreme Court decision creates an unforeseeable judicial enlargement of a penal statute. The Florida Bar's complaint against Mr. Calvo alleged that he violated DR 1-102(A)(1), and DR 1-102(A)(6). Those rules provide that it is an ethical violation for an attorney to violate a disciplinary rule or to engage in any conduct that adversely reflects on his fitness to practice law. It is these rules under which the Supreme Court issued its discipline, not an attorney's outline discussing issues of securities law practice. Third, as discussed more fully below, neither the Referee's findings nor the Florida Supreme Court's decision were based upon federal securities statutes that were allegedly interpreted in the continuing legal education outline.

V

The decision to disbar the petitioner was not based upon an interpretation of federal law.

Petitioner's final point rests upon his assertion that his disbarment is based upon a ruling that "attorneys representing underwriters are, as a consequence of unidentified federal rules, 'experts' for purposes of liability

under the Securities Act of 1933, as amended", and that the Florida Supreme Court opinion stands for the proposition that "attorneys representing underwriters in federally registered securities offerings are jointly responsible, with the issuer and the underwriter, for the sale of offered securities." [Petition, pp. 62-63] It is not necessary for this Court to address the issue of the proper construction of the federal statutes to which Mr. Calvo refers because it is clear that his disbarment was not based upon any interpretation of federal law.

The only reference to federal securities laws in the Florida Supreme Court opinion is in its discussion of Mr. Calvo's argument that the Referee erred when he took notice of the SEC and federal cases arising out of the same conduct being considered by the Referee. The Court concluded:

> We agree with Calvo that SEC disciplinary proceedings are subjected to a different standard of review than are Bar discipline proceeding, but we find that this difference goes only to the weight to be accorded the information in a Florida disciplinary proceeding, not to its admissibility.

App. I, pp. 4-5.

The Florida Supreme Court disbarred Calvo not for a violation of federal rules or statutes, but for engaging in conduct "that adversely reflects on his fitness to practice law." The Referee discussed Mr. Calvo's conduct in detail and found that it adversely reflected upon his fitness to practice law. All of the referee's findings were made without reference to the federal law allegedly misinterpreted by the Referee and the Florida Supreme Court.

The Supreme Court concluded that the Referee's findings were supported by competent, substantial evidence and disbarred Mr. Calvo for violation of the Florida disciplinary rules, not federal law.

This Court's only power over state judgments is to "correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125, 69 S.Ct. 459, 89 L.Ed. 89 (1945). Therefore, if a state court decision rests on independent and adequate state grounds, the Court lacks jurisdiction to review the case or claim. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). As Justice Brennan has stated, these judgments "not only cannot be overturned by, indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases." Justice Brennan, *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977). This Court has stated that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Here, the language of the Florida Supreme Court opinion clearly shows that its decision to disbar Calvo was based on conduct which violated Florida standards of fitness to practice, not on any particular violation of federal law or rule.

VI

The Court should adhere to its policy of extending considerable deference to states in the administration of attorney discipline.

This Court has noted that a state has "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses for the protection of the public, the purification of the bar and the prevention of a re-occurrence." *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1981). Justice Brennan, concurring in the *Middlesex* judgment, stated that, "[T]he traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings [citation omitted] call for exceptional deference by the federal courts." *Id.* at U.S. 438, Brennan, J. concurring. This "exceptional deference" has been translated by the Court into rules for reviewing state court decisions regarding attorney admissions and discipline. In *Theard v. United States*, 254 U.S. 278, 281 (1956), the Court stated:

> It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. State Bar of California*, 353 U.S. 252, and *Schware v. Board of Bar Examiners*, 353 U.S. 232, to sit in judgment on [state] disbarments * * * .

In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1956), the Court held that the standard of review of a state supreme court decision not to admit a bar candidate due to a finding of lack of moral character is "whether the [State Supreme Court] on the record before us could

reasonably find that he had not shown good moral character." The Court applied a similar deferential test in *Konigsberg v. State Bar of California*, 353 U.S. 252, 262 (1956), stating the question as "[d]oes the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of State and Nation?" Applying the cited standard to the case at hand, it becomes clear that the Florida Supreme Court "could reasonably find" that Calvo violated DR 1-102(A)(6) by engaging in conduct that adversely reflects on his fitness to practice law.

CONCLUSION

The Court is respectfully urged to deny the petition for certiorari.

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Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1993

William A. Calvo, III,

Petitioner

- against -

The Florida Bar

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William A. Calvo, III, *Pro Se*
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Dated: September 15th, 1994

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21 pp

QUESTIONS PRESENTED

1. Does the Supreme Court have jurisdiction to review the decision of the Florida Supreme Court in this matter?
2. Has the Petitioner complied with Supreme Court Rule 14.1(h)?
3. Are there substantial federal questions for review by the Supreme Court?

LIST OF PARTIES

The Parties to the proceeding below are:

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The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992), page 12 (note 29).

United States

Abell v. Potomac Ins. Co., 858 F.2d 1104, 1133 (5th Cir. 1988), cert. denied, 492 U.S. 918 (1989), page 14 (note 33).

Austin, et al. v. Bradley, Barry & Tarlow, P.C., et al., reported at CCH F.SEC.L.Rep. Paragraph 98,219, page 14 (note 33), Reply Appendix page 153 and page 19 (note 41).

Camp v Dema, et. al., (8th Cir. 1991), reported at 91 CCH F.Sec.L.Rep. - Decisions - Paragraph 96,291, page 17 (note 38).

Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), 114 S.Ct. 1439; 61 U.S.L.W. 1813 (1994), pages 5 and 17-18.

Cohen v Hurley, 366 U.S. 117, 6 L.Ed. 2d 156, 81 S.Ct. 954 (1961), pages 7 (note 16) and 18 (note 33).

Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), page 9 (note 21).

In re Cascade International Securities Litigation.; United States District Court, Southern District of Florida, Case No. 91-8652-CIV-NESBITT, December 15, 1993; CCH F.SEC.L.Rep. Paragraph 98,110, pages 17 (note 37) and Reply Appendix at page 166 *et. seq.*

In Re Snyder, 427 U.S. 634, 105 S.Ct. 2874, 86 L.Ed. 2d 504 (1985), page 15 (note 34).

Matthews V Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976), page 9 (note 21).

Schatz, et. al. v Rosenberg, et. al., (4th Cir. 1991), reported at 91 CCH F.Sec.L.Rep. - Decisions - Paragraph 96,222, page 17 (note 38).

Truax v Corrigan, 257 U.S. 320, 42 S.Ct. 124, 66 L.Ed 254 (1921)), page 12 (note 27).

OTHER SOURCES

The Florida Bar News, January 15, 1994, reported on page 24, "*Securities Violation; Disbarrment: William A. Calvo, III, P.O. Box 208, Belleview, disbarred effective January 15, 1994.*, page 16.

I. REPLY TO SUMMARY OF ARGUMENT

The Respondent raised three issues in its summary: that the Petitioner failed to establish the jurisdiction of this Court; that there are no substantial federal questions; and, that the petition for writ of certiorari (the "Petition") failed to comply with Supreme Court Rule 14.1(h). The Petitioner notes that he demonstrated jurisdiction in this matter by citation to 102 Stat. 662, 28 U.S.C. Section 1257 (June 27, 1988),[1] the federal statute granting this Court jurisdiction to review decisions of state courts of last resort; that the Respondent itself characterized the basis for the Petitioner's disbarrment as violation of federal securities laws and introduced expert testimony at the proceeding below only as to federal securities laws;[2] and, that the Petitioner's errors in compliance with Rule 14.1(h) were harmless in that the required information was provided under the caption "Argument."[3]

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1. See Reply Appendix at page 207.

2. The testimony of the Respondent's only expert witness in this matter, James W. Beasely, Jr., was limited to issues of federal securities law. It occupies 160 pages of the record (15% of the entire proceeding), and, together with the cases interpreting federal securities laws (the Warehouse Injunction Case and the Warehouse 2e Proceeding) improperly introduced by the Respondent, formed the basis for the decision below.

3. The Respondent did not include citations to excerpts of matters below in his original Petition based on a discussion with personnel in the

In analyzing the proceedings below and compliance with Rule 14.1(h), the Court is urged to note the Respondent's theory for Florida Bar proceedings, *i.e.*, that the role of a referee is only advisory, disciplinary proceedings being original actions in the Florida Supreme Court with the first and only appellate stage being the motion for rehearing.[4]

II. REPLY TO ARGUMENT

1. Compliance with Rule 14.1(h)

The Respondent argues that the Petitioner failed to establish how constitutional issues and federal questions were raised below because such information was not provided un-

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office of the Court's Clerk, where the Respondent was advised that he was not required to cite to the record in certiorari proceedings. In order to assure that this Court is satisfied that all points in the Petition were properly raised below the Petitioner has filed an additional appendix herewith (the "Reply Appendix") containing relevant portions of materials referred to herein. For purposes of clarity, the references to when and how issues were initially raised below is contained either in the text, or in footnotes to the text of the Petitioner's rebuttal of the Respondent's argument.

4. "A Referee's decision in a disciplinary matter is not final, and therefor not subject to interlocutory appeal. The Florida Bar, 329 So.2d 301." Excerpt from Respondent's motion to Dismiss Appeal of Order Limiting Issues at Trial, page 2, filed with the Florida Supreme Court by the Respondent on or about December 31, 1991. See Docket entry number 30 at Reply Appendix page 7.

der the heading "Statement of the Case." It does not claim that they were not raised below. Such information was provided under the heading "Argument" and is augmented herein. Consequently, the Petitioner urges the Court to consider such deficiency in the Petition as harmless error.

2. Federal Questions Relating to Due Process

A. Vagueness:[5] The cases cited by the Respondent are not determinative since they are distinguishable on two major points. First, the examples cited involve rules that reference other rules regulating the practice of law thus providing ascertainable standards of professional conduct. The challenged rule does the opposite by referencing "any other conduct" outside the rules of professional conduct. The second point makes that fact clear. In the instant case the Respondent voluntarily dismissed all counts dealing with rules prohibiting attorneys from engaging in fraudulent conduct[6] (Rules 3-4.3,[7] 4-4.1[8] and 4-8.4[9] of the Rules Governing the

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5. The issue of vagueness was raised by the Petitioner in his Motion for Rehearing filed with the Florida Supreme Court, see Reply Appendix at page 63, *et. seq.*

6. Order of Referee dated July 20, 1992, dismissing all counts based on Rules 3-4.3, 4-4.1 and 4-8.4 of the Rules Governing the Florida Bar, as requested in the Respondent's motion for partial voluntary dismissal of complaint filed on or about April 27, 1992.

Florida Bar), thus, the prohibitions reflected in DR 1-102(A)(6) involved something other than the prohibitions reflected in the counts voluntarily dismissed.

The Respondent suggests that the challenged rule should not be read in a vacuum and that this Court must consider the

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7. Rule 3-4.3 provides as follows: "The standards of professional conduct to be observed by members of the bar are not to be limited to the observance of rules and avoidance of prohibitive acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed all inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by an attorney of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed in the State of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline."

8. Rule 4-4.1 provides as follows: "Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly: (a) Make a false statement of material fact to a third person; or (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal act by a client, unless disclosure is prohibited by rule 4-16."

9. Rule 4-8.4 replaced former DR 1-102(A) and provides as follows: "Misconduct: A lawyer shall not: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) Engage in conduct that is prejudicial to the administration of justice; (e) State or imply an ability to influence improperly a government agency or official; or (f) Knowingly assist a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or law."

Referee's findings of fact concerning the Petitioner's acts. The Petitioner urges that the Referee's findings of fact not be considered in a vacuum but analyzed in light of their dearth of support in the record (except through multiple hearsay testimony[10] and the findings of fact in proceedings involving lowered standards of proof)[11] and in light of this Court's ruling in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), 114 S.Ct. 1439; 61 U.S.L.W. 1813 (1994). The deficiencies in the fact finding process are a major factor justifying this Court's review of the decision below.

The Respondent misstates the Petitioner's argument concerning the effect on DR 1-102(A)(6) of the re-enactment of the Florida Code of Professional Responsibility without its inclusion (although every other part of DR 1-102[A] was re-adopted).[12] The Petitioner clearly asserted that it was

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10. Denied in sworn affidavits by the purported declarants.

11. Involving an issue, on its own, worthy of this Court's consideration, *i.e.*, whether the introduction of judgments involving lower standards of proof is constitutionally permissible.

12. The Petitioner's challenge to DR 1-102(A)(6) was initiated through the Respondent's counter motion to dismiss complaint or for summary judgment filed on or about May 1, 1992, and denied by the Referee on August 15, 1992. It was also raised at the Final Hearing and in the Petitioner's briefs to the Florida Supreme Court. See Record of Final

only the former rules not substantially re-enacted in the new Code that could no longer be enforced. In fact, all of the counts voluntarily dismissed by the Respondent involved provisions of the new Code of Professional responsibility substantially re-enacted from DR 1-102(A) and all continue as viable predicates for action. The Respondent's strategy involved an attempt to avoid the stringent standards of proof required to prove allegations of fraud by dismissing such counts and instead relying on a predicate rule so vague as to cover any conduct that someone might find objectionable. That is not constitutionally permissible and this Court should examine such issue by granting the Petition.

B. Ex Post Facto Aspects:[13] The Respondent argues that the constitutional prohibition against *ex post facto* laws does not apply to rules regulating the practice of law. That contradicts its position below.[14]

Hearing at Reply Appendix at page 24, *et. seq.*; and, the Petitioner's Motion for Rehearing starting at Reply Appendix page 63.

13. The issue of ex post facto legislation was initially raised (although the term ex post facto was not used) by the Petitioner's Motion for Rehearing, the earliest time at which the change in law reflected in the action below could be challenged. See Petitioner's Motion for Rehearing at Reply Appendix, page 65, *et. seq.*

14. As enunciated in the Registrant's response to the Petitioner's

The Respondent acknowledged that a change in standard of proof would constitute a prohibited *ex post facto* action. The Florida Supreme Court improperly permitted the introduction of multiple stage hearsay evidence and final judgments in proceedings involving the "preponderance of the evidence" standard of proof to serve as the sole evidence supporting the judgment below (which required proof under the higher "clear and convincing" standard).[15] This Court should accept certiorari to establish whether rules regulating conduct with consequences more onerous than criminal sanctions[16] should be subjected to restrictions against *ex post facto* action under the due process and equal protection clauses of the Fourteenth Amendment and whether introduction of judgments involving standards of proof lower than required in the subject action are constitutionally tenable.

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counter motion to dismiss complaint or for summary judgment, filed with the Florida Supreme Court by the Respondent on or about May 8, 1992, see Docket item 60 at Reply Appendix page 11.

15. That issue was initially raised in the Petitioner's Appeal Brief to the Florida Supreme Court, see Reply Appendix at page 27, *et. seq.*

16. See dissent of Justice Douglas in Cohen v Hurley, 366 U.S. 117, 6 L.Ed. 2d 156, 81 S.Ct. 954 (1961).

C. Denial of Assistance of Counsel:[17] The Petitioner argues that so long as an attorney can be drafted to continue a proceeding[18] a prosecuting attorney may without justification other than a claim that he intends to call a defendant's attorney as a "rebuttal" witness (without even following through on such assertion), cause the dismissal of a defendant's chosen counsel from any case. That argument makes a mockery of the right to counsel. The presiding official of any tribunal has broad discretion to regulate the proceedings before him but that discretion is not boundless. In the instant case, an examination of the record[19] demonstrates that no facts were presented to the Referee justifying depriving the Petitioner of his right to representation by an attorney prepared for such role. This Court should grant the Petition in order to consider the issue since if the Respondent's argument is to prevail all rights of defendants

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17. This issue was originally raised in the Petitioner's Appeal Brief to the Florida Supreme Court, see Reply Appendix at page 28, *et. seq.*

18. The record demonstrates that Mr. Houston did not even have a written notice of appearance at the Final Hearing (as opposed to Mr. Chamberlin), and he merely used Mr. Chamberlin's notice, with Mr. Chamberlin's name crossed off, see Reply Appendix at page 18, *et. seq.*

19. See Record of Proceedings at Reply Appendix starting at page 18.

to counsel will be very materially impacted.

D. Adequate Notice:[20] The fundamental requirement of due process is opportunity to be heard at a meaningful time and in a meaningful manner.[21] Notice after a prosecutor has lost the exculpatory evidence, witnesses have disappeared and federal regulatory agencies friendly to the prosecutor fail to provide required defensive evidence can hardly be said to be meaningful.

The Respondent now justifies its delays by reference to the Referee's conclusion that they were caused by the Petitioner. The Respondent neither made such argument nor introduced evidence in support thereof, thus, such conclusion has no support in the record. Rather, the only delay to which the Referee could point in the entire proceeding attributable to the Petitioner was the Petitioner's successful challenge of the Referee's initial decision limiting issues at trial to the punishment that ought to be imposed on the Petitioner. A successful challenge to an erroneous material

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20. This issue was raised in the Final Hearing and in the Petitioner's Appeal Brief, see Reply Appendix at page 34, *et. seq.*

21. See Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), and Matthews V Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976).

ruling should not to be seen as exculpatory of the prosecution's delays, especially where all elements of prosecutorial delays detrimental to the Petitioner had already occurred. If prosecuting attorneys are permitted to assume control of the evidence and to try their cases after all exculpatory evidence has become unavailable as a result of prosecutorial neglect, such drastic change in fundamental due process should be based on a decision of this Court.

E. Evidentiary and Discovery Rulings:[22] The Respondent alleges that the Petitioner failed to "describe with any detail the nature of the discovery information denied him and the evidence ruled upon." While the Petitioner believes that such issue was adequately dealt with he has included his evidentiary requests in the Reply Appendix.[23] An examination of such materials makes it clear that deprivation of discovery rights associated therewith (in light of the fact that the Respondent assumed control of the Petitioner's copies of such materials and then lost them) was a deprivation of the

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22. These issues were raised in motions prior to the Final Hearing, at the Final Hearing and in the Petitioner's Briefs and Motion for Rehearing, see Reply Appendix at pages 4-16 (docket) and page 36 *et. seq.*

23. See Reply Appendix at page 111 *et. seq.* and 132 *et. seq.*

Petitioner's rights to due process.[24]

3. Denial of Equal Protection Rights

A. Costs:[25] The Respondent argues that under Florida law the issue of costs should be left to the referee. However, the referee's decision must be based on constitutionally permitted factors. Although noting the McCain Case,[26] the Respondent claims that nothing in the record reflects improprieties. That is because the issue of costs was not dealt with at the Final Hearing but rather by the Referee and counsel to the Respondent *ex parte*.

The Florida Supreme Court established the appropriate standards for assessment of costs in the McCain Case, where a former member of that court was the beneficiary of the decision, but did not follow them in the proceeding below.

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24. The Petition clearly states that the Petitioner was deprived of his right to have matters judicially noted under mandatory judicial notice provisions of Florida law and to introduce relevant, competent evidence (as a result of the refusal of the referee to take such notice or admit such evidence). Specifically he stated that "[a]mong the excluded materials were the judicial record of proceedings in the Gallagher Appeal and reports of the American Bar Association and the Association of the Bar of the City of New York dealing with ethical obligations of attorneys in matters involving securities laws."

25. This issue was initially raised by the Petitioner in his Motion for Rehearing, see "Reply Appendix at page 68, *et. seq.*

26. Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978).

The fact that neither the Referee nor the Court explained the basis for their decision does not insulate it from the conclusion that persons who commit violations of Florida Bar rules receive preferential treatment based on their political connections.[27] That is sufficient to establish violation of both the due process and equal protection guarantees of the fourteenth amendment to the United States Constitution.

B. Right to Non-arbitrary, Cruel or Unusual Punishment: The Respondent claims that because disbarrment is not punitive, the Eighth Amendment's protection against "cruel and unusual punishment should not apply.[28] Disbarrment should not be punitive, however, as applied in the instant case, it was. The Respondent also claims that even if the disbarrment was punitive[29] the Petitioner failed to establish a sufficient federal question. Clearly since the United States Civil

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27. See Truax v Corrigan, 257 U.S. 320, 42 S.Ct. 124, 66 L.Ed 254 (1921), where Chief Justice Taft observed, "Our whole system of law is predicated on the general fundamental principal of equality before the law .... The guarantee was aimed at undue favor and individual or class privilege on the one hand, and a hostile discrimination or the oppression of inequality on the other."

28. This issue was initially raised by the Petitioner in his Motion for Rehearing, see Reply Appendix at page 70, *et. seq.*

29. As demonstrated in the Petition's analysis of the case of The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992).

War the entire course of Supreme Court history has established that state violations of federal constitutional rights involve federal questions.[30]

The Respondent further argues that the multiplicity of punishment over a period of more than a decade is not a factor in determining whether or not punishment is cruel or inhuman. The Petitioner submits that such issue poses a timely and relevant question for determination by this Court.

C. *Prejudice Based on National Origin*:[31] The Respondent claims that the reference to the Petitioner's Colombian ancestry was mere biographical data; however, such reference was accompanied by citations to irrelevant cases involving attorneys engaged in narcotic trafficking designed to prejudice the Referee against the Petitioner. Had the reference been to an attorney's Afro-American background, followed by irrelevant citations to cases involving rape of caucasian women most decent people would have found the prosecutorial conduct outrageous. The prosecutorial conduct in the case

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30. *E.g.*, the series of cases involving the constitutionality of the death penalty decided by this Court.

31. This issue was raised in the Petitioner's Reply Brief to the Florida Supreme Court, see Reply Appendix at page 59 and in the Petitioner's Motion for Rehearing, see Reply Appendix at page 75.

below was improper and the Court should accept certiorari to develop standards necessary to avoid such conduct in the future.

4. Ex Post Facto Aspects

The Respondent claims that because a practicing attorney prepared the materials presented by the Respondent in a publication and seminar sponsored by the Respondent for which it was paid by attendees and for which it granted continuing legal education credits (rather than having been included among the specific rules of conduct promulgated by the Florida Supreme Court), such materials should not be deemed to represent the state of Florida law on such point.[32] That argument, in light of the fact that the Florida Supreme Court forces attorneys to become and remain members of the Respondent as a condition to practicing law in the State of Florida and further forces them to complete an average of 10 hours per year of continuing legal education in seminars approved by the Respondent, is not very persuasive.[33]

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32. Ignoring the vague nature of such promulgated rules and their reference to undefined outside factors.

33. See the Petitioner's reply under the caption "2. *Substantial Federal Questions Relating to Due Process - B. Ex Post facto Legislation*, especially the comments by Justice Douglas in Cohen v Hurley, *supra*. Such comments are especially relevant in the case below where the Florida

The Respondent is an arm of the Florida Supreme Court and as such is responsible for the performance of the duties delegated to it. It is not free to disassociate itself from programs it organizes, charges for and requires members to attend. This Court should review the decision below to determine whether as imposed and applied by the Florida Supreme Court through its agency, the Respondent, its regulation of the practice of law in the State of Florida passes minimal constitutional requirements.[34]

Supreme Court based its decision in large part on the belief that persons involved in the Warehouse matter had, although never charged, been guilty of committing crimes, as a result of which arguments alleging attorney client privilege were not relevant. That view is totally at odds with the recent decision by the United States District Court for the District of Massachusetts in *Austin, et al. v. Bradley, Barry & Tarlow, P.C., et al.*, reported at CCH F.Sec.L.Rep. Paragraph 98,219, see Reply Appendix at page 153, *et. seq.*, where under circumstances substantially more clear than those in the case below, that court found, citing Abell v. Potomac Ins. Co., 858 F.2d 1104, 1133 (5th Cir. 1988), cert. denied, 492 U.S. 918 (1989), that "Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose.' "). For all their rhetoric, Plaintiffs have failed to indicate what duty the defendant law firms had. As Plaintiffs have failed to allege that the law firms represented them, no duty has been created between, them or with the public at large, and, therefore, the counts for primary violations of S10(b) and Rule 10b-5 cannot be maintained and must be dismissed."

34. That is especially important to the federal Court system since, as cited by the Respondent (referring to the case of *In Re Snyder*, 427 U.S. 634, 105 S.Ct. 2874, 86 L.Ed. 2d 504 [1985]), state bar rules are incorporated into rules regulating practice in the federal courts, and, in fact, at least three federal courts have a direct interest in this Court's decision in this matter based on proceedings initiated as a result of the decision of the

5. Federal Questions[35]

The Respondent argues that the instant case presents no federal questions, but rather was decided solely by reference to rules governing the Florida Bar. That its completely inaccurate. Amazingly, the proceeding below involved no analysis or interpretation of rules governing the Florida Bar.[36] In fact, the Respondent did not even introduce the text of the relevant rules at the final hearing, but rather, at the *ex parte* request of the Referee, weeks after the proceeding had been concluded. Perhaps most illustrative of the nature of the proceeding below is the Respondent's report thereof contained in its own publication, the Florida Bar News, January 15, 1994, reported on page 24, as follows:

> "**Securities Violation; Disbarrment**: William A. Calvo, III, P.O. Box 208, Belleview, disbarred effective January 15, 1994.
>
> In 1985, Calvo was working as counsel to persons involved in the

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Florida Supreme Court below.

35. The issue was initially raised at the Final Hearing, see Reply Appendix at page 17. It was discussed in detail in the Petitioner's Appeal Brief, Reply Brief and Motion for Rehearing, see Reply Appendix at pages 39, 59 and 75, respectively.

36. See the Petitioner's objection to the testimony of the Respondent's expert witness at the final hearing based on such fact, at page 17 of the Reply Appendix.

sale of federally regulated securities. Calvo and his clients were required to sell a minimum of 1.2 million shares within 150 days of the effective date of the prospectus. Failure to meet the requirements would mean that all monies paid by purchasers of the securities had to be returned. When it became apparent that the minimum number of shares would not be sold within the deadline, Calvo either became aware that his clients had arranged to obtain short term loans, or he participated in obtaining them. The loan proceeds were used to create the appearance that the minimum number of shares were being sold. Those who loaned money in turn were paid exorbitant fees, with one man receiving a profit of $75,000 for the use of a quarter million dollars for a single day. Prior to the closing dates, one of the principals involved in the securities offer was indicted for mail fraud. Calvo and his clients were required to disclose the information to potential investors. They did not. Closing did not occur until two weeks later than required, and without proper filings of notice or permission of the governing authorities, which Calvo knew, or should have known was required by law."

The proceeding below involved federal questions exclusively and the decisions based thereon clearly contradict interpretations of federal law both in the United States District Court for the Southern District of Florida,[37] other federal courts[38] and in this Court (see Central Bank of Den-

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37. See CCH F.SEC.L.Rep. Paragraph 98,110, *In re Cascade International Securities Litigation.*; United States District Court, Southern District of Florida, Case No. 91-8652-CIV-NESBITT, December 15, 1993, a copy of which is included in the Reply Appendix at page 166.

38. The governing cases clearly establish that in the context of federal securities laws an attorney has no disclosure duties to persons with whom he has no fiduciary relationship. They clearly establish that performance of traditional lawyer's functions will not form the basis for violations of federal securities laws. See, *Schatz, et. al. v Rosenberg, et. al.*, (4th Cir. 1991), reported at 91 CCH F.Sec.L.Rep. - Decisions - Paragraph 96,222; and *Camp v Dema, et. al.*, (8th Cir. 1991), reported at 91 CCH F.Sec.L.Rep. - Decisions - Paragraph 96,291.

ver, N.A. v First Interstate Bank, *supra*).

The Respondent urges this Court not to look behind the Florida Supreme Court's decision but rather to presume that it appropriately rested on exclusive state law grounds. That is supported by neither the record nor the Respondent's own published analysis thereof. More importantly in the context of federal questions is the impact of the Florida Supreme Court's decision on interstate commerce. None of the actions involved in the proceeding below involved Florida law. It is un-contradicted that the Petitioner was not involved in filing Warehouse materials with the State of Florida.[39] All of the Petitioner's legal obligations, if any, where imposed under federal laws. To the extent that obligations imposed by bar regulators were involved, the rules regulating the New York Bar and those regulating the practice of law under the United States District Courts for the Southern and Eastern Districts of New York and Southern District of Florida, and the United States Courts of Appeal for the Second, Fifth and Eleventh Circuits were equally applicable.[40] Indeed, the

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39. That function having been indisputably performed by the politically influential firm that replaced the Petitioner's law firm as counsel to the underwriter in October of 1984.

rules governing practice of law in the United States District Court for the District of Massachusetts would seem to have been controlling since the Warehouse registration was filed in the Boston Regional Office of the Securities and Exchange Commission.[41] This Court, not the Florida Supreme Court, should be the principal authority in deciding the issues presented by the case below. Rather than deferring to the Florida Supreme Court, this Court should, upon analysis of the issues presented, find that the decision of the Florida Supreme Court constitutes an improper intrusion into the federal realm of interstate commerce.

III. CONCLUSION

The arguments of the Respondent in its brief objecting to

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40. No state bar organization should be constitutionally permitted to impose obligations on attorneys involving the practice of federal law, which would require them to violate the ethical obligations imposed under the rules regulating the practice of law in other states or in the federal system.

41. The standards of the United States District Court for the District of Massachusetts are totally at odds with those of the Florida Supreme Court. See Austin, et al. v. Bradley, Barry & Tarlow, P.C., et al., *supra*. That decision's interpretation of an attorney's duties pertaining to client confidentiality are diametrically opposed to those espoused by the Florida Supreme Court in the action below.

certiorari are based on inaccurate legal and factual premises. The regulation of the practice of law in a federal system, involving federally imposed duties and in the context of interstate commerce, especially where the party seeking review is subject to regulation by two different states and more than six federal courts does not present issues which should be deferred to the courts of a single state. The issues raised are timely, have been extensively developed through litigation in a number of federal circuits (in addition to several states) and this Court has recently announced an interpretation of federal law that has a substantial impact on the applicable law. The Petitioner's constitutional arguments are likewise clear and have been properly raised below. All involve matters of fundamental importance to the operation of the nation's legal system. For all of the foregoing reasons, the Petitioner respectfully prays that this Court grant his Petition.

Respectfully submitted, this 15th day of September, 1994.

/s/William A. Calvo, III/s/
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Supreme Court, U.S.
FILED
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No. 93-1779

In the Supreme Court of the United States

October Term, 1993

William A. Calvo, III,

Petitioner

- against -

The Florida Bar

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX TO REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
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Dated: September 15th, 1994

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Because of the word-processing program used, footnotes are numbered sequentially throughout the whole appendix, rather than following the original numeration of each separate document. The initials FHT in the Appeal Brief refer to Final Hearing Transcript.

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Number & Date	Description
1/August 9, 1991	Complaint
2/August 9, 1991	Complainant's Request for Admissions
3/August 16, 1991	Order Designating Referee
4/August 31, 1991	Respondent's Answer, Defenses & Mitigating Factors
5/August 31, 1991	Respondent's Response to Request for Admissions
6/September 17, 1991	Complainant's Second Request for Admissions
7/September 20, 1992	Referee's Order Setting Final Hearing Date on November 18, 1991
8/September 25, 1991	Complainant's Motion to Limit Issues at Trial
9/September 25, 1991	Memorandum of Law in Support of Complainant's Motion to Limit Issues at Trial
10/September 28, 1991	Respondent's 1st Request for Production of Documents & Admissions
11/_____	Missing Transcript of Hearing on Complainant's Motion to Limit Issues at Trial

Number & Date	Description
12/October 3, 1991	Respondent's Opposition to Motion to Limit Issues at Trial
13/September 21, 1991[1]	Complainant's Reply to Respondent's Opposition to Motion to limit Issues at Trial
14/October 9, 1991	Respondent's Motion to Compel Production of Documents and to Provide Admissions on Expedited Basis
15/October 10, 1991	Respondent's Motion to Dispense with Oral Argument or to Permit Participation by Telephone with Reference to Motion to Limit Issues at Trial
16/_____	Missing Transcript of Hearing on Respondent's Motion to Compel Production of Documents and to Provide Admissions on Expedited Basis
17/October 24, 1991	Complainant's Response to the Respondent's 1st Requests for Production of Documents or Admissions

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1. Obviously misdated since it replies to materials filed on October 3, 1991.

Number & Date	Description
18/October 28, 1991	Responsive Supplement to Memorandum in Opposition to Complainant's Motion to Limit Issues at Trial
19/November 4, 1991	Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
20/November 13, 1991	Complainant's Response to Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
21/November 20, 1991	Respondent's Reply to Complainant's Response to Respondent's Motion to Compel Production of Documents, Admissions, and to Postpone Final Hearing Date
22/November 30, 1991	Referee's Order Granting Complainant's Motion to Limit Issues at Trial
23/December 2, 1991	Referee's Order Re-Setting Final Hearing
24/December 4, 1991	Complainant's Motion for a Continuance of Final Hearing

Number & Date	Description
25/December 10, 1991	Respondent's 1st Interrogatories to the Complainant
26/_____	Missing Transcript of Hearing on Complainant's Motion to Amend its Complaint
27/December 17, 1991	Complainant's Amended Complaint
28/December 20, 1991	Order Granting Complainant Leave to Amend Complaint
29/December 23, 1991	Notice of Respondent's Appeal of Order Limiting Issues at Trial
30/December 31, 1991	Complainant's Motion to Dismiss Appeal of Order Limiting Issues at Trial
31/January 7, 1992	Respondent's Motion for Stay of Final Hearing Pending Appeal of Referee's Order Limiting Issues at Trial
32/January 8, 1992	Opposition to Complainant's Motion to Dismiss Appeal of Order Limiting Issues at Trial
33/January 10, 1992	Respondent's Motion to Permit Filing of More than 30 Interrogatories and to Require Response at Least 10 days Prior to Final Hearing

Number & Date	Description
34/January 15, 1992	Correspondence to Supreme Court from Respondent
35/January 21, 1992	Motion for Tolling of Time to File Brief Pending Determination of Motion to Dismiss Appeal
36/January 22, 1992	Motion to Supplement Record for Purposes of Appeal
37/January 23, 1992	Referee's Order Denying Respondent's Motion to Compel Admissions Referee's Order Staying Final Hearing Pending Appeal
38/January 24, 1992	Complainant's Motion for a Protective Order Prohibiting All of the Respondent's Interrogatories
39/January 24, 1992	Order Granting Motion for Tolling of Time Pending Determination of Motion to Dismiss Appeal
40/January 27, 1992	Complainant's Response to Respondent's Motion to Supplement Record for Purposes of Appeal
41/January 27, 1992	Complainant's Response to Respondent's Motion to Permit Filing of More than 30 Interrogatories and to Require

Number & Date	Description
	Response at Least 10 Days Prior to Final Hearing
42/February 3, 1992	Respondent's Reply to Response to Motion to Supplement Record for Purposes of Appeal
43/February 3, 1992	Respondent's Reply to Response to Motion to Permit Filing of More Than 30 Interrogatories
44/February 12, 1992	Supreme Court's Order Denying Motion to Dismiss Appeal of Referee's Order Limiting Issues at Trial
45/February 18, 1992	Referee's Order Granting Complainant's Motion for a Protective Order, Limiting Respondent to Three Interrogatories to the Complainant
46/February 18, 1992	Referee's Order Denying Motion to Supplement record for Purposes of Appeal
47/March 3, 1992	Letter to Referee from Supreme Court Regarding Status
48/March 4, 1992	Respondent-Appellant's Brief Appealing Decision of Referee Limiting Issues at Trial
49/March 4, 1992	Supreme Court Brief Scheduling Order

Number & Date	Description
50/March 5, 1992	Filing of Technical Corrections to Respondent's March 4, 1992 Brief
51/March 10, 1992	Complainant's Limited Answer to 3 of the Interrogatories Propounded by the Respondent
52/March 10, 1992	Complainant's Interrogatories to the Respondent
53/April 9, 1992	Complainant's Answer Brief on Appeal of Order Limiting Issues at Trial
54/April 23, 1992	Respondent's Reply Brief on Appeal of Order Limiting Issues at Trial
55/April 27, 1992	Respondent's Motion for Partial Voluntary Dismissal of Complaint
56/April 29, 1992	Notice of Submission of Appeal to Supreme Court Without Oral Argument
57/May 1, 1992	Respondent's Motion to Supplement Record
58/May 1, 1992	Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
59/May 6, 1992	Complainant's Response to Motion to Supplement Record

Number & Date	Description
60/May 8, 1992	Complainant's Response to Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
61/May 13, 1992	Respondent's Reply to Complainant's Response on Motion to Supplement Record
62/May 13, 1992	Order Granting Motion to Supplement Record
63/May 14, 1992	Respondent's Reply to Complainant's Response to Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
64/July 2, 1992	Decision of Supreme Court rejecting Referee's Order Limiting Issues at Trial
65/July 2, 1992	Cover Letter to Referee re Decision of Supreme Court rejecting Referee's Order Limiting Issues at Trial
66/July 13, 1992	Complainant's Notice of Status Conference
67/_____	Missing Transcript of Status Conference on July 15, 1992
68/_____	Missing Transcript of Hearing on Respondent's Counter Motion to

Number & Date	Description
	Dismiss Complaint or for Summary Judgment on July 17, 1992
69/July 17, 1992	Complainant's Notice of Final Hearing
70/July 20, 1992	Complainant's Re-notice of Final Hearing
71/July 20, 1992	Referee's order Granting Complainant's Motion for Partial Voluntary Dismissal of Complaint
72/July 24, 1992	Memorandum of Law in Support of Complainant's Response to the Respondent's Counter Motion to Dismiss Complaint or for Summary Judgment
73/July 27, 1992	Respondent's Motion to Strike Unauthorized Memorandum of Law
74/July 31, 1992	Complainant's Response to Respondent's Motion to Strike Unauthorized Memorandum of Law
75/August 5, 1992	Respondent's Reply to Complainant's Response to Respondent's Motion to Strike Unauthorized Memorandum of Law

Number & Date	Description
76/August 15, 1992	Referee's Order Denying the Respondent's Motion to Dismiss Complaint or for Summary Judgment and the Respondent's Complaint to Strike Unauthorized Memorandum
77/August 17, 1992	Correspondence from the Complainant on Behalf of Referee Requesting Record for use at September 14, 1992 Final Hearing
78/August 17, 1992	Respondent's Motion for Stay Pending Appeal
79/August 20, 1992	Notice of Appeal by Respondent of Order Denying Summary Judgment
80/August 21, 1992	Emergency Motion for Stay of Final Hearing Pending Appeal
81/August 27, 1992	Complainant's Response to Emergency Motion for Stay of Final Hearing Pending Appeal
82/August 27, 1992	Referee's Order Denying Emergency Motion for Stay of Final Hearing
83/August 31, 1992	Reply to Complainant's Response on Motion for Stay of Final Hearing Pending Appeal

Number & Date	Description
84/August 31, 1992	Respondent's Request for Judicial Notice
85/September 1, 1992	Motion for Tolling of Time to File Brief Pending Determination of Complainant's Motion to Dismiss Appeal
86/September 4, 1992	Complainant's Motion requesting Judicial Notice
87/_____	Missing Transcript of Hearing on September 8 Pertaining to Complainant's Request for Judicial Notice
88/September 8, 1992	SC Order Granting Motion to Toll Time Pending Appeal
89/September 9, 1992	SC Order Dismissing Appeal of Order Denying Summary Judgment, w/o Prejudice
90/September 10, 1992	Efforts made by Complainant to Obtain Materials Requested by the Respondent
91/September 12, 1992	Referee's decision granting Complainant's Request for Judicial Notice
92/September 12, 1992	Referee's decision on Respondent's Motion for Judicial Notice, denying Judicial Notice of the Requested Matters Not

Number & Date	Description
	Directly Dealing with Prior Proceedings in this Matter
93/September 12, 1992	Referee's decision refusing to admit introduction of excerpts of depositions of witnesses by the Securities and Exchange Commission in the Warehouse cases, but directing Complainant to make best efforts to obtain complete depositions from the Securities and Exchange Commission
94/September 14, 1992	Notice of Appearance by Larry D. Houston on Behalf of Respondent, in Place of G. Richard Chamberlin (Disqualified by Referee)
95/September 25, 1992	Affidavit of Complainant Regarding Costs
96/November 24, 1992	Affidavit of Complainant Regarding Costs
97/September 29, 1992	Affidavit of L. Linda Perkins Submitted by the Complainant re Testimony of Marvin Richmond at Final Hearing
98/December 10, 1992	Report of Referee

Number & Date	Description
99/December 10, 1992	Notice of Filing Record with Report of Referee
100/December 10, 1992	Six Volume Transcript of Final Hearing Proceedings
101/December 10, 1992	Petitioner's & Respondent's Exhibits Introduced at Final Hearing
102/December 28, 1992	Correspondence from Respondent Concerning Timing for Filing Notice of Appeal
103/December 28, 1992	Notice of Correct Address for Respondent

Excerpts from Record of Final Hearing

I. Federal Question

Record page/line

0019/

[Florida Bar Counsel]

"10 Finally, the Florida Bar will present
11 James Beasley, who will testify in his capacity
12 as an expert in the field of securities law
13 regarding the conduct that took place by the
14 Respondent in this case."

....

0294/

"8 MR. WHALEN: The Florida Bar the now calls
9 James Beasley as our witness.
10 MR. CALVO: We have certain motions we
11 would like to address at this point objecting to
12 his testimony and it's, of course, based on the
13 assumption what he is going to testify to are
14 securities law. This a not a securities
15 proceeding, it is a Bar proceeding.
16 We have a set of facts that we need to
17 establish and those facts may establish
18 violation of securities laws, maybe they won't.

I am hoping I can prove they wouldn't in any case, but that's not relevant.

The relevance is that those facts have to establish a violation of a single disciplinary rule -- Disciplinary Rule 1-102(a)(6) and that to the extent that his testimony relates to securities laws, that would not only not not

0295/

material, but could be prejudicial.

THE COURT: I will let him testify."

II. Deprivation of Right to Counsel

Page/Lines

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Thereupon:

The following proceedings were had:

MR. WHALEN: First of all, I am Steve Whalen, counsel for the Florida Bar.

MR. CALVO: I am William A. Calvo, III. I am the respondent.

MR. HOUSTON: I am Larry Houston. I am here appearing as co-counsel with Bill Calvo.

MR. CHAMBERLAIN: My name is Richard Chamberlain and I am also appearing on behalf of Mr. Calvo.

MR. WHALEN: At this point, Your Honor, I would like to make an objection. This is the first time Bar counsel had any notice whatsoever that there was other co-counsel in this case. There was no notice of appearance whatsoever, no pleadings filed, no nothing indicating they have co-counsel.

Mr. Calvo already indicated that Mr. Chamberlain is going to be a witness in this matter and I would want to invoke the rule that any person being a witness would not be present during testimony in this case.

THE COURT: Do you want to respond?

MR. CALVO: Yes, Your Honor. In fact I did

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indicate that my partners would help me with the questioning in a prior hearing. I don't specifically recall when it was when we were discussing it.

It certainly would be difficult to do my own testimony.

Secondly, I have absolutely no litigation experience. I have never done a trial. I will try to take the lead position but whatever errors I am making, they will assist me, if there is some procedural matter they are familiar with that and I am not.

The proceedings will be more fairly and more expeditiously decided if we are dealing with attorneys who know what they are doing.

I am very good in the things that I do I think but I know I have never done any litigation. Representing myself is all I have done.

MR. WHALEN: If I may, if he is talking of fairness, this is brought in Monday morning, the beginning of the hearing that he now has co-counsel, one that it is anticipated as being a witness if not by Mr. Calvo, then possibly in rebuttal by the Florida Bar.

0005

Mr. Calvo has made absolutely no notice to the Court and Bar counsel; either has Mr. Houston that he would be appearing as co-counsel.

I think it is improper and unfair and it is untimely.

MR. HOUSTON: What is the prejudice?

THE COURT: Do you have written notice of appearance as attorney?

MR. CHAMBERLAIN: I have written notice. I don't have a case number here. I am not sure I have it.

MR. WHALEN: If I might, for the record --

THE COURT: Are you going to address the fact that he might be a witness.

MR. CALVO: Your Honor, The Code of Professional Responsibility indicates a person's attorney ought not to be a witness in a case unless depriving him as a witness would result in prejudice to the defendant.

There is not an absolute prohibition against a person's counsel also being a witness. We have the code right here.

THE COURT: Show me where it says that.

MR. WHALEN: Mr. Chamberlain will be

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present during all the testimony that takes place here including Mr. Calvo and all the other witnesses which then he will have clear advantage should he have to testify depending on what is said in these proceedings.

Once again, I would certainly invoke the rule and I don't think it is proper or that it cures anything by at very morning at the beginning of the proceedings for Mr. Chamberlain to execute notices of appearance or Mr. Houston or anybody for that matter, any attorney.

This case has been going on for over a year and we get notice at 9:30 or 9:40 on the 14th of September that he now has co-counsel.

MR. CALVO: This is the rule.

THE COURT: Rule 4-3.7, Rules of Professional Conduct.

MR. WHALEN: If I may make a comment, Your Honor. I also notice in 4-3.7 (B) where it says, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 4-1.7 or 4-1.9."

Mr. Chamberlain would be testifying about things when he was not a lawyer or not a partner

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with Mr. Calvo when they were unassociated. I think that would preclude him from testifying.

Number two, if you look at Part A, his testimony may very well go to the substance, not just a matter of formality of which he will be testifying to. I think it's improper but in any event, go ahead.

THE COURT: I think he would either have to be attorney for you or not be able to testify. So that would be my ruling, if he is going to be a witness which precludes him from being one of your attorneys in this matter.

MR. CALVO: I think he is essential for cross examination of Mr. Bremer because he has been involved and is the only one with

experience.
THE COURT: Are you saying you want to use him as a witness?[2]
MR. WHALEN: He very well may be a rebuttal witness. Mr. Calvo already indicated at our status conference on Friday that he was calling Mr. Chamberlain as a witness.
THE COURT: I think he will have to not act as one of the attorneys.
MR. CALVO: If I may --

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THE COURT: That would be my ruling.
MR. CALVO: Your Honor, if I might respond to that.
I have indicated that I intend to call Mr. Whalen as a witness. That does not preclude him from participating as counsel.
MR. WHALEN: The Bar will object to that when we get to that.
MR. CALVO: The fact that Mr. Whalen, who has not previously indicated that --
THE COURT: That was my ruling. Let's go to something else.
You have to wait outside, sir.

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2. Footnote added by Petitioner. The question was addressed to Mr. Whalen, as evidenced by his immediate response thereto, not to the Petitioner, who obviously did not respond.

II. DR 1-102(A)(6)

Page/Lines

0010

Your Honor, that are many, many rules in that code that have to do with Mr. Calvo's role as an attorney, acts of fraud, acts of dishonesty, acts of misrepresentation, all of those things in his role as an attorney.

This particular rule contemplates other acts done by Mr. Calvo not in his role as an attorney. There is not in the pleadings, Judge, one iota of allegation at all as to any sort of act that Mr. Calvo did outside his role as an attorney, which would qualify under this particular rule.

If indeed the Bar at this point is not prepared to go forward with evidence of that character, it would appear to me and I would suggest to the Court that this ought to be dismissed because everything else they have becomes irrelevant and immaterial.

MR. WHALEN: Your Honor, I first of all object to him making a motion. Mr. Calvo, and I will locate it for you, has already made that motion to dismiss and the Court denied his

motion to dismiss. He also made that motion to the Supreme Court as part of his emergency stay and they didn't rule on it.

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This has been referred to this Court. You have already denied that motion.

THE COURT: Same ruling then.

MR. HOUSTON: Your Honor --

THE COURT: Only one at a time arguing, so let's set some ground rules.

One lawyer for each side can argue a point and examine a witness and things of that nature, so I don't want two joining in.

MR. HOUSTON: We understand.

THE COURT: So that motion will be denied.

Tell me what the other one is. You said two, everything was dropped except two. One is DL1-102 (a)(6) and the other is what number?

MR. WHALEN: 102(a)(1).

MR. HOUSTON: Just as a point of clarity, it was my understanding that the previous motion counsel has alluded to had not to do with the arguments that I just made but rather that Mr. Calvo's previous motion had to do with the fact that these rules were appealed in '87 and would no longer apply to now.

Is that the gist of the motion?

THE COURT: I had that in mind when I made

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the ruling. I had anticipated that could come up. I was thinking about that. My ruling would be the same.

Are you ready to proceed?

Excerpts from Petitioner's Appeal Brief

I. Changes in Standard of Proof

"The Referee denied Respondent's request for mandatory judicial notice based on Complainant's arguments and granted Complainant's motion for judicial notice over Respondent's objection that the differences in standard of proof in the cases which Complainant sought to introduce with the "clear and convincing" standard applicable to the pending proceeding made their introduction improper and prejudicial.[3]"

"*The Hearing*: Complainant introduced the following evidence at the final hearing: 1. The decision of Judge Peter Dorsey in the case of SEC v Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988); and the decision of Judge Regensteiner in In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), on both of which Complainant placed heavy evidentiary reliance, alleging that they should be treated as having met a standard of proof akin to "beyond a reasonable doubt."[4]"

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3. Especially in light of this Court's rejection of the Referee's decision on Complainant's Motion to Limit Issues at Trial.

4. FHT, Pages 15, 16 (see lines 17 to 19), 17. See response of Respondent at FHT, Page 22 (lines 11 et. seq.), 23 and 24.

"(3) Having totally been unable to demonstrate the existence of any scheme through his witnesses,[5] Complainant, despite this Court's ruling on the Referee's motion to limit issues at trial, used the factual findings of the injunction action as alleged proof of facts in the instant case, see FHT, Page 1021, 1022.[6]"

"Respondent was deprived of ability to properly present his case by the Referee's refusal to take mandatory judicial notice or permit introduction of the corroborating materials from the Gallagher series of cases, while permitting introduction for purposes of establishing facts of cases with lower standards of proof and which had, for purposes of this proceeding, been barred by this Court."

II. Deprivation of Right to Counsel

"*Exclusion of G. Richard Chamberlin*[7]: Respondent had been required because of financial constraints to represent

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5. Even Bremer having testified that no one intended to violate the law at closing and that Respondent felt everything was legal.

6. Clearly improper in light of the different standards of proof involved, see generally Lawton v State, 13 So.2d 211 (1943).

7. Final Hearing Transcript (hereinafter referred to as "FHT), Pages 3 to 8.

himself prior to the final hearing; however, he secured the agreement of his former Warehouse counsel to lead a team comprised of Mr. Chamberlin, Respondent and, for technical assistance, Larry D. Houston, a member of the law firm with which Respondent is employed, to defend him at the final hearing. Mr. Chamberlin was fully familiar with the case, having been involved in related proceedings for more than four years; however, Mr. Houston was almost totally unfamiliar with the details of the case.

When Respondent appeared with counsel at the final hearing, Complainant sought to disqualify both Mr. Chamberlin and Mr. Houston because, until that time, Respondent had represented himself. Failing in that argument, he objected to Mr. Chamberlin on the grounds that Respondent intended to call Mr. Chamberlin as a witness (he was to testify as to the finding by the United States Court of Appeals for the 11th Circuit in the Gallagher case that Respondent had issued no closing opinions). Respondent argued that Bar rules do not prohibit legal counsel for a party from giving testimony *if such restriction is unduly prejudicial to the client*, and that in the instant case, the exception should apply.[8] Respondent further indicated that Mr. Chamberlin was more important as an attorney than as a witness, and that, put to the choice, Respondent would not call Mr.

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8. See Rule 4-3.7(a)(4).

Chamberlin as a witness. At that point Complainant stated that he, without prior notice to the Referee, Respondent or Mr. Chamberlin, intended to call Mr. Chamberlin as a rebuttal witness and insisted that the rule be invoked prohibiting witnesses from hearing prior testimony.[9] The Referee acquiesced in Complainant's demands and Mr. Chamberlin was precluded from representing Respondent. Neither party thereafter called Mr. Chamberlin as a witness,[10] nor did Complainant attempt to talk to Mr. Chamberlin or secure his attendance by subpoena."

"Respondent was deprived of his ability to properly conduct his defense by the Referee's improper barring of his attorney, based on Complainant's false statement that Mr. Chamberlin would be called as a rebuttal witness."

"The Referee's evidentiary rulings, both prior to and at the hearing, his restrictions on Respondent's ability to undertake meaningful discovery, and his exclusion of Respondent's attorney from the hearing all violated

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9. Respondent had been precluded from calling attorneys for Complainant as witnesses, upon objection by Complainant. The Court is asked to note the provision of Section 90.616(c) of the Florida Rules of Evidence and note that Mr. Chamberlin was certainly "a person whose presence [was] ... essential to the presentation of a party's case."

10. Respondent declined to call him as a witness in order to preserve his rights on appeal.

Respondent's constitutional rights to due process, both on the state and federal levels.[11]

The government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of due process guarantees which extend to legislative, judicial, executive and administrative proceedings. See State v Kelly, 112 S.E.2d 641, 644 (1960); West Virginia State Board of Education v Barnette, W.Va., 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, (1943); Lovell v City of Griffin Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed.2d 949 (1938). The general meaning of due process has been applied to administrative agencies. See Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935). Once a requirement of due process of law is deemed to apply, the question becomes what process is due, see Smith v Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed 2d 14 (1977). Due process is a flexible concept. See Matthews v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976) and it calls for such protection as a particular situation demands. The determination of what process is due in a particular situation requires a balancing or weighing of the individual or private and governmental interest in each particular situation, see Tler v Vickey, 517 F.2d 1089, *rehear-*

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11. See fifth, sixth and fourteenth amendments.

ing denied; Banks v Vickery, 521 F.2d 814, 815 (1975); and, Perry v Sell, 521 F.2d 815, *cert. denied* 96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393 (1976). A court should first identify and isolate competing interest and then weigh relative importance before reaching assessment, see Davis v United States 415 F.Supp 1086 (1976). The extent to which procedural due process must be afforded a person is implied by the extent to which a person may be condemned to suffer a grievous loss, see Johnson v Breliz D.C. 482 F.Supp. 125 (1979). Due process of law requires essential fairness and justice in proceedings. It is in procedural aspect, cost and guarantee of due process that assures to every person his or her day in court, see Truck v Carringon, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed 254 (1921).

The opportunity to be heard has been required to be adequate, fair, reasonable, meaningful in time and manner, see Parrot v Taylor, 101 S.Ct. 1908, 451 U.S. 527, 68 L.Ed.2d 420 (1981); Matthew v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976); Fuentos v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972). The hearing before a trier of fact is to be fair and impartial, see Schwaker v McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Failure of a tribunal to protect constitutional rights to confront or advise witnesses is a denial of due process, see Barber v Page, 88 S.Ct. 1318, 390 U.S.

719, 20 2d 255 (1968). Constitutional rights of confrontation and cross examination cannot be side-stepped because it happened to be convenient for one of the parties, see Holman v Washington, 364 F.2d 618 (1967). The exercise of a trial court's discretion must conform with due process, see United States v Grande 620 F.2d 1026 (1980).

The conduct of the Referee in depriving Respondent of meaningful discovery, in refusing to take mandatory judicial notice, in excluding Mr. Chamberlin and in depriving Respondent of an opportunity to present clearly relevant evidence impermissibly violated Respondent's right to effective legal counsel and to effective cross examination of the witnesses against him.[12] Indeed, it clearly demonstrated an impermissibly favorable predisposition towards Complainant. Those grounds in and of themselves justify reversal of the Referee's decision.[13]"

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12. Administrative convenience is not adequate support for infringement upon a Constitutional right, see Howell v Tobinen, 279 F.Supp 22; Shapiro v Thompson, 89 S.Ct. 1322, 394 U.S. 618 (19__).

13. The hearing before a trier of fact is to be fair and impartial, see Schwaker v. McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Due Process is the compendius expression for all those rights which the courts must enforce because they are basic to our free society, see Wolf v. People of State of Colorado, 69 S.Ct. 1359, 338 U.S. 25, 93 L.Ed 1782 (1949). It is an elementary precept in our form of law and government that a human being has an inherent right to due process of law, see Bund v. Wilson, 73 S.Ct. 1045, 346 U.S. 137, 97 L.Ed 1508. (1953). Due Process is interwoven throughout the common law, long prior to adoption of the Magna Carta, see Stoer v. Ok-

III. Adequate Notice

"There was any justification for the multi-year delay between the grievance committee decision and the initiation of this action, the failure to have the Complaint signed, or, the addition of a number of unauthorized charges to the Complaint.[14] (10) Complainant could not provide copies of materials pertaining to the initial years of its investigations to Respondent because they had "disappeared from the files."

" 2. VIOLATIONS OF RULE 3-7.4:[15] The constitutions of the United States[16] and the State of Florida

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lawaha River Farms Cp., 138 So. 270, (1931). Due Process is secured by the Magna Carta and successive constitutions of civilized states and nations, see Herman Doll V. Unemployment Compensation Comm., 82 A.2d 177, 182 7 NJ 547 (1951). In the United States, the concept of due process is embodied in the Fifth Amendment to the Constitution of the United States of America: "No person shall ... be deprived of life, liberty or property without due process of law."

14. That failure did not stop the Referee from finding Respondent at fault for such delays.

15. Florida Bar Rule 3-7.4(j): "If a grievance committee finds that there was probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding.

16. See fifth, sixth and fourteenth amendments.

provides specific constitutional guarantees that even the Florida Bar must respect. Among the most important is the right to due process. Complainant does not deny that it has failed to comply with the procedural requirements promulgated by the Supreme Court in conjunction with initiation of proceedings such as this one. Rather, it argues that such requirements are without substance.

Rule 3-7.4 specifically regulates grievance committee proceedings and must be complied with. It provides both timing requirements and other procedural requirements, none of which appear to have been complied with by Complainant, despite a preparation period of more than three years and, involvement by Mr. Whalen in the matter for more than three months prior to initiation. The deficiencies involved not only lack of timeliness, but total failure to comply with the requirement that the complaint be signed by the presiding member of the grievance committee [see Rule 3-7.4(j)].

With reference to timing deficiencies, Complainant cited to rule 3-7.11(a) and claimed that proper enforcement of such Rule requires separate contempt proceedings against the bar or against the Supreme Court. That argument appears ludicrous when one asks who would hold such proceedings, or seek to enforce them. Complainant ignored the observations of the Court in Florida Bar v Randolph, 238 So.2d 635 (1970), where addressing the issue of un-

warranted delays, the Court held that "while the time provisions of the predecessor to current rule 3-7.11(a) are directory rather than jurisdictional, still, responsibility for proceeding with diligence rests with the Bar. When it fails in the regard, the penalizing incidents which the attorney suffers from the unjust delay might well supplant more formal judgments as a form of discipline, even when the record shows that the attorney's conduct merits discipline. The current action could not more strongly reflect the Court's concerns and thus, Complainant's complaint should have been dismissed."

"The multi year delay in bringing this action led Respondent to leave a family business,[17] return to Florida and restart his life. A new disruption is neither called for nor proper."

IV. Evidentiary or Discovery Rulings

"3. Discovery[18]: During September of 1991, Respondent

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17. Respondent, prior to making such move and after completion of the SEC suspension, verified his good status with Complainant, see the certificate of good standing dated August 10, 1990, annexed as exhibit B to this Brief.

18. The Court is asked to note that the following matters involved clear violations by Complainant of Rule 4-3.4 of the Rules Regulating the Florida Bar.

served upon Complainant a request for production of documents and admissions. Because Respondent deemed Complainant's response inadequate, he filed a motion to compel production of documents and admissions on November 19, 1991. On December 25, 1991, Respondent served his first set of interrogatories on Complainant and filed a motion requesting permission to file more than 30 interrogatories and to require response at least 10 days prior to final hearing. On January 23, 1992, the Referee denied Respondent's motion to compel admissions and the next day Complainant moved for a protective order pertaining to the requested interrogatories, which the Referee granted, requiring a response to only five interrogatories.

4. Evidentiary Rulings

Judicial Notice: In contemplation of the final hearing, Respondent filed a Request for Mandatory Judicial Notice on August 31, 1992, principally of the court record of proceedings involving the underwriters in the Warehouse case in the United States Court of Appeal for the 11th Circuit, the United States Supreme Court and, in an action ancillary to the Warehouse injunctive action[19] in the United States District Court for the District of Connecticut, and on

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19. SEC v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988).

September 4, 1991, Complainant filed its own Motion Requesting Judicial Notice. The Referee denied Respondent's request for mandatory judicial notice based on Complainant's arguments and granted Complainant's motion for judicial notice over Respondent's objection that the differences in standard of proof in the cases which Complainant sought to introduce with the "clear and convincing" standard applicable to the pending proceeding made their introduction improper and prejudicial.[20]

Request for Permission to Introduce Excerpts from Prior Sworn Testimony of Non-Parties and of Taped Telephone Transcripts Provided by Complainant's Chief Witness to FBI: On September 12, 1992, Respondent requested permission to introduce excerpts from the sworn testimony of witnesses deposed by the SEC in the Warehouse investigation and case, as well as from telephone conversations taped by Complainant's chief witness, Edward Bremer, provided by him to the FBI and transcribed by the United States Justice Department. The Referee, at the request of Complainant, denied Respondent's request but indicated that he would accept complete copies of depositions and the complete Bremer Tapes, if they could be obtained by Complainant from the SEC.[21] At the final hearing, the Referee

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20. Especially in light of this Court's rejection of the Referee's decision on Complainant's Motion to Limit Issues at Trial.

permitted Respondent to read selected portions of the Bremer tapes into the record in conjunction with cross examination of Mr. Bremer, and to read into the record selected portions of the deposition of Bremer's attorney, Gary Granai. However, Complainant elicited the Referee's agreement that he would only provide such materials whatever weight the Referee found appropriate."

V. Federal Question

"C. Mr. Richmond's testimony indicated that: (1) Prior to the Warehouse closing, he had never met Respondent,[22] and that Respondent arrived after the closing had started, and there, for the first time, gave him and the bank the purported "disbursement letter." FHT, Page 440, 441, 442. (2) The escrow agent confirmed on the Friday prior to closing that it had been instructed by Messrs. Bremer and Gallagher to make a disbursement of approximately $325,000 to him directly and that the escrow agent agreed to do so three days prior to receipt of the "purported dis-

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21. Respondent had been unable to secure any cooperation from the SEC. Complainant obtained some, but not all, of the requested depositions, as a result of which Respondent was precluded from introducing significant evidence in his favor.

22. And that Bremer lied when he indicated that Mr. Richmond and Respondent met at a restaurant prior to the closing discussing mutual friends from Chicago.

bursement letter." FHT, Page 434. (3) He had met with the escrow agent's manager and staff prior to closing and completely disclosed to them the nature of his transaction [and therefore, by necessary inference, that there was no reliance on the "purported disbursement letter" as a condition to closing], FHT, Page 439-440. (4) He had spoken to Respondent during the afternoon of Friday, April 19, 1985, at the suggestion of Mr. Bremer, to verify that Mr. Richmond would receive his money upon breaking of escrow directly from the escrow agent, and that Respondent had agreed to provide the escrow agent with written instructions to that effect on behalf of Bremer and Gallagher, FHT, Page 435, 447. (5) The "purported disbursement letter" was, in fact, the letter Richmond had been promised, FHT, Page 447, 448. (6) Respondent played no role in finding him or in negotiation of the terms of his transaction, FHT, Page 431, 432, 433. (7) He had been sued in an ancillary action by the SEC seven years ago, through a trustee, to recover proceeds of the Warehouse offering but that he has not yet been required to make any restitution, and that he had no explanation for such lapse, FHT, Page 456, 457. (8) Respondent referred to the Richmond transaction as the purchase of an account receivable in a telephone call after the closing, during 1985, FHT, Page 445. (9) A broker by the name of Kolinosky was waiting at the closing for a large wire that would have been added

to the balance in the escrow account at closing, FHT, Page 453, 454.[23] (10) His whole transaction was with the banker and no one else, FHT, Page 458.[24]

D. Mr. Beasely's testimony indicated that:[25] (1) Only the registrant can amend the registration statement, FHT, Page 317.[26] (2) After he was replaced as underwriter's counsel, Respondent became special counsel to Warehouse, FHT, Page 317.[27] (3) The identity of underwriter's counsel was

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23. The Court is asked to note that, had that wire arrived, then the Bremer Advertising purchase would have been above the minimum offering, making all allegations as to its impropriety irrelevant.

24. See also page 448 where Mr. Richmond indicated that the decision to proceed to closing was made prior to Respondent's arrival.

25. The Court is asked to note that Complainant succeeded in convincing the Referee not to take judicial notice of the materials in recognized scholarly materials [Matthew Bender's SEC Series] which contradicted most of Mr. Beasely's testimony. See FHT Pages 363 to 366.

Mr.Beasely's testimony as to what the law was was not properly admitted since expert testimony is limited to factual and not legal issues, see Devin v City of Hollywood, 351 So.2d 1022 (1976).

26. The Court is asked to note that Mr. Beasely was technically incorrect as a matter of law since SEC Regulation C at Rule 478 specifies that any person signing a registration statement may amend or withdraw it. The Court is also asked to note that under no one's interpretation of the facts did Respondent meet the foregoing qualifications.

27. The Court is asked to note that the Referee reached the same finding of fact despite a total absence of evidence from Respondent, Bremer or anybody else to such effect, and in light of Bremer's earlier specific repudiation of such possibility, on cross examination, see FHT, Page 197.

material information that had to be disclosed to investors, FHT, Page 319.[28] (4) It was not unusual to have disbursements directly from escrow not disclosed in the registration statement and that the escrow agent would be advised as to such disbursements by a letter such as the "so called disbursement letter." FHT, Page 356.[29] (5) He attached no particular significance to the manner in which disbursement instructions were provided to the escrow agent, FHT, Page

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28. But, contrary to Mr. Beasely's statements, please see SEC Regulation C at Rule 436, in general, and subsection (e), specifically (which directly contradicts Mr. Beasely's testimony as to applicable law). See also SEC Release 33-6950 as it relates to consents [(10) *Consents -- (a) Experts:*], and, the definition of "counsel" in Item 228.509 of Regulation SB (the current successor to Regulation SK for small offerings). See SEC Rule 430A which permits a registration to be declared effective prior to determination of the identity of the membership of the underwriting syndicate.

In fact, the disclosure concerning the underwriting is contained in Item 508 of Regulation SK. That regulation provides no requirements at all concerning the identity of or changes in the identity of counsel to the underwriter. The situation of underwriter's counsel after declaration of effectiveness is most closely analogous to the situation of trial counsel after a trial decision, where the client, through another attorney, elects to appeal. There is absolutely no requirement for such counsel to file a motion for withdrawal as legal counsel with the court.

29. For an additional example of another such letter in the Warehouse offering, the Court is requested to review exhibit E(G)-1 to Respondent's written submission to the grievance committee, included in toto as Respondent's exhibit 8 at the final hearing.

Mr. Beasely's testimony on this point fatally flawed Complainant's argument concerning the nature and importance of the subject letter!

357. (6) The escrow agent failed to properly discharge its duties, FHT, Page 358. (7) Contrary to his initial testimony, neither the SEC nor, at the time of the Warehouse offering, the State of Florida, had authority to review registration statements as to the merits of the offering, FHT, Page 367, 368, 369, 370, 371. (8) Despite having agreed to testify at the hearing as an expert, he was not familiar with the SEC release dealing with the ethical obligations of attorneys when clients fail to make full disclosure, FHT, Page 371, 407, 408 (where the Referee, at the request of Complainant, refused to permit Respondent to question Complainant's expert as to the ABA and Association of the Bar of the City of New York's extensive studies and materials concerning the obligations of securities lawyers), 409, 410. (9) An an investor was free to borrow funds to purchase securities in a public offering as long as he does not borrow from the underwriter or the company, FHT, Page 376. (10) He could not, off the top of his head, cite to any rules or regulations supporting his opinions, FHT, Page 377. (11) He knew of no regulations that prohibited an affiliate of the company from purchasing stock in a public offering, FHT, Page 377 and 378. (12) Off the top of his head, he could not define an affiliate, FHT, Page 379.[30] (13) The concept of dilution

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30. The Court is asked to compare the definition suggested by Respondent with the definition thereof by the SEC in Rule 144. The court is asked to note that Mr. Beasely's differentiation of persons who might not be deemed affiliates does not conform to the SEC standards

was an important concept in securities law, FHT, Page 379, 380. (14) The purchase of securities in a public offering, at the public offering price, would have no affect on dilution, FHT, Page 380.[31] (15) After further cross examination, he was not sure whether or not the dilution table would have to be amended prior to closing to disclose purchases of securities by affiliates at the closing, FHT, Page 381. (16) All indictments, whether dropped, minor or dealing with matters having nothing to do with the offering, must be disclosed in a registration statement, or post effective amendments thereto, FHT, Page 382, 383, 384, 385.[32] (17) The qualifying language of Item 401 of Regulation SK had no meaning, FHT, Page 385.

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reflected in SEC Rule 144, the rule regulating sale of securities by affiliates.

31. But the Court is asked to note Item 506 of Regulation SK, which makes it clear that, if purchases by affiliates must be disclosed, then so must their affects on dilution. The Court is also asked to note the absurdity of Mr. Beasely's position as a practical matter. How can you disclose prior to closing something that you will not discover until the moment of closing!

32. The Court is asked to note that Item 401 of Regulation SK contained the following qualifying language "Describe any of the following events that occurred during the past five years and that are material to the evaluation and the ability and integrity of any director or executive officer of the registrant. And that with reference to such qualification, Mr. Beasely's expert opinion was that it had no meaning.

(18) On further cross examination, that if an indictment had been dropped, disclosure would have involved a judgment call, FHT, Page 385.[33]

(19) The escrow agent has total control over the escrow proceeds and neither the company nor the underwriter can have any input on its decisions, FHT, Page 387. (20) It is legally permissible for the duties of an underwriter's counsel to be divided between a number of law firms, FHT, Page 387. (21) Item 601(24) of Regulation SK required underwriter's counsel to file a consent to the use of its name in the registration statement, FHT, Pages 388, 389.[34] (22) If Respondent's firm had not filed a consent to the use of its name in the registration statement, that would be "another indicator that the prospectus ... is clearly false and misleading, FHT, Page 390, 391.[35] (23) A prospectus drafter's responsibility is limited to his knowledge after reasonable inquiry, at the time of drafting

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33. A crucial admission on the indictment issue.

34. However, his testimony is directly and unequivocably contradicted by SEC Regulation C, at Rule 436(e), which states that: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity. The Court is asked to note that the disclosure of underwriter's counsel "as having acted in such capacity" obviously contemplates action in the past tense, with no reference to any future activities.

35. However, see SEC Regulation C, at Rule 436(e) quoted above.

the prospectus, FHT, Page 392. (24) Securities laws do not require that a registration statement be prepared by an attorney, FHT, Page 393. (25) When an attorney is listed as "counsel"[36] that attorney is the guarantor of all the information in the subject registration statement as an expert, FHT, Page 393, 394.[37] (26) In his entire, multi-decade professional career, he had been involved in less than 5 best efforts offerings, FHT, Page 394. (27) In his entire,

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36. Which Mr. Beasely previously defined as including underwriter's counsel.

37. Mr. Beasely's position is clearly contrary to all law on such point. The Court is asked to note the following rules, regulations, and "real" authoritative sources: SEC Rule 436(e), Item 228.509 of new regulation SB; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035, 1234 through 1242, and 1256; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119; *Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985*, pages 214 through 217; and, *Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 4-343, 4-344, 4-231 through 4-234.11.

Mr. Beasely's "opinion" is clearly at variance with the SEC's pronouncement on point in In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer Binder 84,145-84,178) , which involved the following guideline. *"When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end his client's noncompliance."*

multi-decade professional career, he has represented an underwriter in one or two best efforts offerings, FHT, Page 394.[38] (28) 28. In his entire, multi-decade professional career, he has never been involved in a public offering involving less than $1,500,000, FHT, Page 394.[39] (29) The typical cost of a post effective amendment was about $1,000 per sentence, FHT, Page 395. (30) When an insider is involved in a transaction with the company involving even a few thousand dollars, a post effective amendment pertaining thereto must be filed, FHT, Page 397. (31) Contrary to the preceding answer, that if 43 separate transactions involving insiders occurred, it would be absurd to assume that you would have to file 43 different post effective amendments, FHT, Page 396, 397. (32) There are materially standards for all amendments to registration statements, FHT, Page 397. (33) Attorneys who file nothing and provide no opinions can still have federal securities laws liabilities, FHT, Page 398. (34) He had never heard of an instance when the SEC or anyone else brought a law suit against someone alleging that a prospec-

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38. It appears improbable that Florida Bar rules permit a person to characterize himself as an expert in matters that he has been involved in once or twice.

39. The Court is asked to note that Form S-1 is the form required by the SEC for larger offerings and that it appears that Mr. Beasely had no experience with Form S-18 or its requirements, the Form involved in the Warehouse offering and which had significantly lower disclosure obligations.

tus was not material because a change in the underwriter's legal counsel was not disclosed, FHT, Page 400. (35) There is no federal securities law requirement that underwriters be represented by legal counsel, FHT, Page 403. (36) In small offerings, the blue sky function is performed by counsel to the underwriter, FHT, Page 403, 404.[40] (37) The National Association of Securities Dealers, Inc. (the "NASD") would not normally deal with anyone other than underwriter's counsel, FHT, Page 404.[41] (38) First, that he had never heard of NASD rules regulating oversubscribed offerings, and almost immediately thereafter, that "sure he had heard of them" but had no idea what they dealt with, FHT, Page 404, 405. (39) He could not answer questions posed by Respondent of the top of his head, although he had had no such problem with questions posed by Complainant, FHT, Page 405. (40) If an affiliate bought one share or $10 worth of securities in a public offering, the closing could not take place until

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40. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the Blue Sky Applications; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

41. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the NASD documents; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

registration statement were amended to disclose the purchase (which had not taken place yet) because no materiality standards applied to affiliate purchases, they all had to be disclosed, FHT, Page 406.[42] (41) No firm he has ever been involved with would have ever been involved in an offering as small as the Warehouse offering, FHT, Page 407. (42) He was testifying as an expert as to why lawyers should never represent small companies or small underwriters, FHT, Page 407. (43) A wrong interpretation of a law ought not, in and of itself, to constitute a basis for securities and Bar sanctions, FHT, Page 408. (44) He evaded responding to questions dealing with the SEC's proposed guidelines for securities lawyers faced with non-complying clients, FHT, Page 409. (45)[43] Nothing the underwriter or company could have said would have justified release of the Warehouse offering proceeds by the escrow agent after April 7, 1985, FHT, Page 412. (46) There was nothing wrong with underwriter's counsel drafting amendments to registration statements but that they could not file them, that being reserved to the issuer, FHT, Page 418. (47) It is not improper for an attorney who rep-

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42. The Court is asked to note that although Form S-18 and Regulation SK require disclosure as to sale of securities by an affiliate, no item deals with purchases by affiliates in the offering. The Court is also asked to note that Mr. Beasely's answer contradicted his answer at FHT pages 377 and 378.

43. After significant attempts at hedging and avoiding the question.

resents a client on certain matters to respond to inquiries from such client concerning other matters, in which the client is represented by other legal counsel, FHT, Page 424. (48) Cold comfort letters are a method by which legal counsel verifies the accuracy of statements made concerning the company's financial [statements], FHT, Page 425."

"SUMMARY OF THE ARGUMENT

The Referee's decision is based on improperly introduced evidence and lacks factual and legal support sufficient to sustain his conclusions. It cannot be disputed that almost every procedural deficiency that can exist was present in Complainant's case. The Rule on which it based its case was repealed without re-enactment prior to commencement of its case.[44] The case was started more than two years after it should have been and the Complaint was not signed, as required, by the presiding officer of the grievance committee. Complainant was deprived of effective discovery by the Referee's improper protective order.[45] Respondent was deprived of ability to properly

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44. Complainant convinced the Referee that this Court's determination that the old rules would continue to apply to matters pending on the date of their repeal remedied that defect. However, Complainant's case was not pending on that date or for a long time thereafter.

45. Limiting discovery to 5 interrogatories, especially distressing in a case where all of the major witnesses are outside the jurisdiction or

present his case by the Referee's refusal to take mandatory judicial notice or permit introduction of the corroborating materials from the Gallagher series of cases, while permitting introduction for purposes of establishing facts of cases with lower standards of proof and which had, for purposes of this proceeding, been barred by this Court. Respondent was deprived of his ability to properly conduct his defense by the Referee's improper barring of his attorney, based on Complainant's false statement that Mr. Chamberlin would be called as a rebuttal witness. The Referee improperly permitted the testimony of Mr. Beasely, but thereafter improperly excluded Respondent's evidence of standards of conduct established concerning the issues in question by numerous other Bar organizations. Finally, following the final hearing, the Referee improperly communicated on an ex parte basis with Complainant, and Complainant, who somehow had many original portions of the record in its possession, failed to file them as part of the record.

ARGUMENT

SUBSTANTIVE MATTERS: This case presents a number of the major considerations facing securities lawyers during the first half of the 1980s, that being the conflict between their Bar related obligations and emerging positions by the

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governmental agencies that refused to co-operate with Respondent.

SEC. The issues have been clearly discussed by the American Bar Association and by the Association of the Bar of the City of New York, both organizations in which Respondent was a member. The most that ought to be argued, assuming that this Court is willing to emasculate the concepts of attorney client privilege, confidentiality and loyalty owed by attorneys to their clients is that Respondent honestly espoused one of two competing legal theories during 1985, and that his proved to be the weaker.

The attorneys in both In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer Binder, Pages 84,145-84,178),[46] and SEC v National Student Marketing Corp., 457 F. Supp. 682 (D.C. 1978), the two leading cases imposing obligations on attorneys in securities' law matters, were clearly found to have knowingly violated securities laws, they both clearly represented a party to such violations, and had represented such party extensively for a long period of time. In neither case were the subject attorneys subjected to sanctions of any kind. In the case of In re Keating Muething & Klekamp, CCH F. Sec. L. Rep. Paragraph 82,124 (1979 Transfer Binder at page 81,981,

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46. Respondent's conduct in Warehouse was similar to that of White & Case in In re Carter, *i.e.*, he informed counsel for Warehouse that he thought certain types of disclosure was required. It must be noted that no one at the Commission has ever considered the conduct of White & Case in In re Carter to have been improper.

81,995), where members of a law firm were found by the Commission to have participated in a continuing, multi-year series of materially inaccurate filings with the Commission, including filings reflecting forgiveness of over $1,000,000 in debt owed by a member of the Firm to the registrant, the Commission punished the errant group of attorneys by requiring them to improve their office procedures. All of the subject lawyers were found culpable in a manner significantly greater that Respondent was by Judge Dorsey. In none of such cases were the attorneys subjected to any disbarrment or suspension sanctions whatsoever.[47]

The Referee's decision is based principally on the decision of Judge Dorsey, improperly before the Referee and contradicted by the weight of the evidence presented; and, by the testimony of Complainant's expert, also improperly introduced but more importantly, specifically contradicted in all material respects by the rules promulgated by the SEC in Regulations C and SK. The great weight of the

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47. Respondent has been unable to find any reported litigated 2(e) proceedings where former counsel for an underwriter have been found responsible for filing registration statements, contrary to the wishes of the registrant. Respondent doubts that there are, or should be, any. This would be especially true in a situation such as this one, where Respondent has testified that he was only one of a series of law firms that represented the underwriter, and that his Firm's representation terminated before the offering began.

evidence, and all of the credible evidence disproves the allegations of Complainant.[48] Perhaps most damaging to Complainant's case were the admission by Bremer that at the time of closing all parties including Respondent believed that they were acting legally. Upon conclusion of Complainant's case, Respondent moved for dismissal, and that motion should have been granted.

The summary of testimony which constitutes the bulk of this brief, makes it clear that Complainant failed to prove its complaint in accordance with the applicable clear and convincing standard, if at all.[49] Except for its expert witness and his own improper testimony, Complainant's witnesses testified that Respondent not only thought that he was acting legally, but that he would not act improperly. Bremer's testimony in conflict with Respondent's was contradicted by Complainant's own witnesses,[50] by his own taped conversations, and by the sworn testimony of his own attorney to the SEC . Bremer's lack of credibility was

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48. Indeed, having introduced the Bremer testimony and then the contradictory testimony of Messrs. Richmond and Caruncho, Complainant clearly violated Rule 4-3.3(a) of the Rules Regulating the Florida Bar.

49. Indeed, the evidence, both qualitatively and quantitatively, overwhelmingly supported all of Respondent's assertions.

50. Caruncho as to the indictment and Richmond as to Respondent's participation at the closing.

cited in both the decisions improperly introduced by Complainant.[51]

Complainant's purported expert was not shown to have been designated or certified by the Florida Bar, could cite to only one section of one regulation in support of his conclusions, and as to that single section, specific SEC Rules proved him utterly wrong.[52] Indeed, the plain language of numerous SEC rules cited by Respondent but ignored by the Referee made it clear that Mr. Beasely was wrong in almost every part of his testimony. With little wonder. His expertise was limited to one or two representations of underwriters in offerings requiring different forms and applying different regulations. Unfortunately his extremely and demonstrably wrong testimony was both persuasive and very prejudicial."

"3. VIOLATIONS OF DUE PROCESS: The Referee's evidentiary rulings, both prior to and at the hearing, his restrictions on Respondent's ability to undertake meaningful discovery, and his exclusion of Respondent's attorney from

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51. Judge Regensteiner having specified that Bremer had deceived Respondent.

52. The Court is requested to note that Mr.Beasely's claimed status as an expert violated Rule 4-7.6 of the Rules Regulating the Florida Bar, and thus, his testimony should have been excluded.

the hearing all violated Respondent's constitutional rights to due process, both on the state and federal levels.[53]

The government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of due process guarantees which extend to legislative, judicial, executive and administrative proceedings. See State v Kelly, 112 S.E.2d 641, 644 (1960); West Virginia State Board of Education v Barnette, W.Va., 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, (1943); Lovell v City of Griffin Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed.2d 949 (1938). The general meaning of due process has been applied to administrative agencies. See Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935). Once a requirement of due process of law is deemed to apply, the question becomes what process is due, see Smith v Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed 2d 14 (1977). Due process is a flexible concept. See Matthews v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976) and it calls for such protection as a particular situation demands. The determination of what process is due in a particular situation requires a balancing or weighing of the individual or private and governmental interest in each particular situation, see Tler v Vickey, 517 F.2d 1089, *rehear-*

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53. See fifth, sixth and fourteenth amendments.

ing denied; Banks v Vickery, 521 F.2d 814, 815 (1975); and, Perry v Sell, 521 F.2d 815, *cert. denied* 96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393 (1976). A court should first identify and isolate competing interest and then weigh relative importance before reaching assessment, see Davis v United States 415 F.Supp 1086 (1976). The extent to which procedural due process must be afforded a person is implied by the extent to which a person may be condemned to suffer a grievous loss, see Johnson v Breliz D.C. 482 F.Supp. 125 (1979). Due process of law requires essential fairness and justice in proceedings. It is in procedural aspect, cost and guarantee of due process that assures to every person his or her day in court, see Truck v Carringon, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed 254 (1921).

The opportunity to be heard has been required to be adequate, fair, reasonable, meaningful in time and manner, see Parrot v Taylor, 101 S.Ct. 1908, 451 U.S. 527, 68 L.Ed.2d 420 (1981); Matthew v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976); Fuentos v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972). The hearing before a trier of fact is to be fair and impartial, see Schwaker v McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Failure of a tribunal to protect constitutional rights to confront or advise witnesses is a denial of due process, see Barber v Page, 88 S.Ct. 1318, 390 U.S.

719, 20 2d 255 (1968). Constitutional rights of confrontation and cross examination cannot be side-stepped because it happened to be convenient for one of the parties, see Holman v Washington, 364 F.2d 618 (1967). The exercise of a trial court's discretion must conform with due process, see United States v Grande 620 F.2d 1026 (1980).

The conduct of the Referee in depriving Respondent of meaningful discovery, in refusing to take mandatory judicial notice, in excluding Mr. Chamberlin and in depriving Respondent of an opportunity to present clearly relevant evidence impermissibly violated Respondent's right to effective legal counsel and to effective cross examination of the witnesses against him.[54] Indeed, it clearly demonstrated an impermissibly favorable predisposition towards Complainant. Those grounds in and of themselves justify reversal of the Referee's decision.[55]

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54. Administrative convenience is not adequate support for infringement upon a Constitutional right, see Howell v Tobinen, 279 F.Supp 22; Shapiro v Thompson, 89 S.Ct. 1322, 394 U.S. 618 (19__).

55. The hearing before a trier of fact is to be fair and impartial, see Schwaker v. McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Due Process is the compendius expression for all those rights which the courts must enforce because they are basic to our free society, see Wolf v. People of State of Colorado, 69 S.Ct. 1359, 338 U.S. 25, 93 L.Ed 1782 (1949). It is an elementary precept in our form of law and government that a human being has an inherent right to due process of law, see Bund v. Wilson, 73 S.Ct. 1045, 346 U.S. 137, 97 L.Ed 1508. (1953). Due Process is interwoven throughout the common law, long prior to adoption of the Magna Carta, see Stoer v. Ok-

Excerpts from Petitioner's Appeal Reply Brief

I. Prejudice Based on National Origin

" While the evidence of wrongdoing by the escrow agent and the Wilkes-Beers Firm is unequivocable, the blame has been transferred to the Respondent as a scapegoat.[56]"

II. Federal Questions

"III. Participation by Mr. Beasely: The Complainant's argument starts by ignoring the fact that the Respondent objected to Mr. Beasley's testimony, and was promptly overruled. The stipulation referred to involved only Mr. Beasley's artfully prepared resume.

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lawaha River Farms Cp., 138 So. 270, (1931). Due Process is secured by the Magna Carta and successive constitutions of civilized states and nations, see Herman Doll V. Unemployment Compensation Comm., 82 A.2d 177, 182 7 NJ 547 (1951). In the United States, the concept of due process is embodied in the Fifth Amendment to the Constitution of the United States of America: "No person shall ... be deprived of life, liberty or property without due process of law."

56. The Referee's specific finding of fact that the Respondent was born in the Republic of Colombia is indicative of potentially improper bias. The Respondent doubts that any current court would find the fact that a person was black or a woman a relevant issue; however, the unfortunate association of Colombians with the illicit drug trade has made them ideal scapegoats.

This case did not involve scientific, technical or other specialized knowledge, it involved purported violations of Bar rules. The SEC has and exercises its own mechanisms to deal with violations of its rules, that being the 2(e) process. That rule has been recognized as in conflict with the obligations of attorneys under state bar ethical rules.[57] Mr. Beasley's testimony involved facts to which he was not privy, and law which he did not know. Unfortunately, his inaccurate testimony was "expertly and convincingly" presented in a manner which terminally tainted the subject proceeding.[58]

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57. See, *e.g.*, American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980); Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977); Block & Ferris, *SEC Rule 2(e) - A New Standard of Ethical Conduct or an Unauthorized Web of Ambiguity?* 11 Capital University Law Review 501 (1982); Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 Notre Dame Lawyer 774 (1979); Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 33-6344)*, 37 The Business Lawyer 915 (1982); *Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979)*, 35 The Business Lawyer 605 (1980).

58. His aircraft analogy missed one vital point, that being that the Complainant, by refusing to postpone a hearing, made it impossible for the Respondent to board the flight.

Not unsurprisingly, the Complainant fails to refute the Respondent's brief with reference to the numerous and material errors of law presented as facts by Mr. Beasely. That false testimony was the cornerstone for the Complainant case and as it crumbles, so should this action."

"VI. Referee's Findings Are Not Supported by Credible Evidence: As the Complainant stated, the Referee's findings of fact are presumed correct *unless clearly erroneous or lacking in support*.

The Referee found that the Respondent was special counsel to Warehouse, then counsel to the underwriter, and then special counsel to Warehouse, a proposition with no support on the record from anyone except the expert witness, who had no personal knowledge. The bulk of the Referee's findings were clearly predicated on the expert witness' statements to the effect that, as a matter of law, counsel for the underwriter was one of the persons described in Item 601(24) of regulation S-K, had to provide a written consent to the use of his name in the prospectus, and could be replaced as legal counsel only pursuant to a formal amendment to the prospectus. Indeed, when it was called to his attention that the Respondent had not filed such a consent, he indicated the Respondent was guilty of further violations. However, as the Respondent demonstrated by referencing the actual rules of the SEC,

the expert was totally wrong, as a matter of law! The issue is specifically dealt with by SEC Rule 436(e), which directly contradicted Mr. Beasley's statements."

Excerpts from Petitioner's Motion for Rehearing

I. Issues Involving Vagueness

"7. Former Disciplinary Rule DR1-102(A)(6) on which the Court bases its decision is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States."[59]

"7. Unconstitutionality of DR1-102(A)(6)

The due process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[60] Such statutes, in a legal setting,

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59. See amendments Five and Fourteen to the United States Constitution.

60. See **Baggett v Bullitt**, 377 U.S. 360 (1964); **Keyishian v Board of Regents**, 385 U.S. 589 (1967); **Watkins v United States**, 354 U.S. 178 (1957); **Lovell v City of Griffin**, 303 U.S. 444 (19__); **Thornhill V Alabama**, 310 U.S. 88 (1940); **Talley v California**, 362 U.S. 60 (1960); **Edwards v South Carolina**, 372 U.S. 229 (1963); **Cox v Louisiana**, 379 U.S. 536 (1965); and, **Brown v Louisiana**, 383 U.S. 131 (1966).

lend themselves "to selective enforcement against unpopular causes," see **NAACP v Button**, 371 U.S. 415 (1963).[61]

DR1-102(A)(6) provides as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102, but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Complainant to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Complainant's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[62]"

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61. See also **Southeast Aluminum Supply Corp. v Metropolitan Dade County**, 533 So.2d 777 (3rd DCA 1988).

62. See also **D'Alemberte v Anderson**, 349 So.2d 164 (1977); and, **State v Wershow**, 343 So.2d 605 (1977).

II. Ex Post Facto Aspects

"3. The Court determined that the expert witness' testimony introduced by the Complainant was proper and accurate concerning the Respondent's status as legal counsel to the "parties"[63] and as to the role of legal counsel as an "expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended. In this regard, the Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission rules 436(e)[64] and 478.[65] While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Ex-

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63. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. See excerpts from Bremer affidavits discussed *infra*.

64. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

65. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein. Copies of Securities and Exchange Commission Rules 436(e) and 478 are annexed hereto as composite exhibit 3.

change Commission, the federal courts or other states, the Complainant had itself indicated to the legal community in the State of Florida that in the preparation of registration statements, attorneys were not to be deemed experts,[66] thus the Complainant should be estopped from taking a contrary position in this action and the Court should reconsider its legal conclusion in this matter.[67]"

"3. The Role of Counsel in Securities Transactions

In addition to its attorney disciplinary role, the Complainant regulates the practice of law in the State of Florida by imposing educational standards and sponsoring seminars to meet such goals. At the very least, the Complainant must be held responsible for not misleading practitioners in such seminars so that in applying the laws as espoused, they

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66. See the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

67. And if it determines that a change in standards is called for, apply it prospectively only.

become guilty of violating the rules governing the practice of law in the State of Florida.[68]

In this regard, the Court is asked to note that the testimony of the Complainant's expert on which it and the Referee materially relied is totally at odds with the position which the Complainant takes in conjunction with its role as educator of Florida attorneys. That is unequivocally demonstrated by the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

If such materials do not reflect the actual state of the law in Florida, then the Complainant must be estopped

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68. To hold otherwise is akin to authorizing constitutionally impermissible entrapment.

from bringing this action after having been responsible for so thoroughly confusing the understanding of the actual law.

Based on the foregoing, the Court should reconsider its decision in this case."

III. Equal Protection, Costs

"2. The Court assessed all of the Complainant's costs against the Respondent, despite the fact that: (i) The Complainant's initial strategy of limiting issues at trial had been reversed by this Court the previous year; (ii) The Complainant had been forced to drop a majority of the counts in its complaint against the Respondent when it found that they had not, in fact, ever been authorized, and would have violated the Respondent's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Complainant's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) This Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2(e) proceeding.

The factors established by this Court for assessment of costs in a case cited by the Complainant itself, **The**

Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978), lead to a determination that, even if the Complainant was successful in its case, each party should bear its own costs in this action. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions."

"2. The Issue of Costs

The Court should reconsider its assessment of costs, in light of its decision in **The Florida Bar v McCain**, 361 So.2d 700, 705 (Fla. 1978), cited by the Complainant. The action involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench. Addressing the issue of proper assessment of costs, the Court held that each party should bear its own costs where the Florida Bar takes an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint. In the instant case as in the McCain case, the Florida Bar took an overbroad approach, as a result of which, it had to voluntarily dismiss a majority of the counts with which it had charged the Respondent. Such overbreadth occasioned the Respondent significant costs of scarce funds and time, as did the Complainant's eventually unsuccessful argument concerning limiting issues at trial.

Based on the McCain decision, this Court should reverse the Referee's assessments of costs.

This Court may not differentiate in the application of its criteria for assessment of costs between minority attorneys and former Supreme Court members. To do so violates the Respondent's right to equal protection guaranteed by the Florida and United States Constitutions."

IV. Arbitrary, Cruel or Unusual Punishment

"8. The punishment imposed by the Court against the Respondent is, under the facts of this case, violative of the Respondent's rights under the Constitutions of the State of Florida[69] and the United States as impermissibly excessive and cruel.[70]"

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69. It violates both the excessive, cruel and unusual and the double jeopardy provisions of the Florida Constitution. Double jeopardy issues are material because, as the lost records of the Florida Bar would demonstrate, this action was initiated at the request of the Securities and Exchange Commission, and merely attempted to secure for the Securities and Exchange Commission what it failed to accomplish in its own 2(e) proceeding.

70. See amendments Five, Eight and Fourteen to the United States Constitution.

"8. Unconstitutionally Nature of Discipline Imposed

The eighth amendment to the Federal Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of this case, when considered with the intervening punishment to which the Respondent and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of the Respondent is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Complainant.

The case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Complainant's contentions; however, as in the case of most, if not all the cases cited by the Complainant, it does support the propositions which the Respondent has requested this Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Complainant had to establish the element of intent by clear and convincing evidence, at the final hearing, and that dis-

cipline in this case would not serve the three purpose test referred to in that case.

At the final hearing, no evidence was introduced to indicate that the Respondent intended to deceive anyone; rather, Bremer, the Complainant's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the Referee's findings of fact concerning issues of the Respondent's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[71]

With reference to discipline, the Court held that it had to meet three tests:

First, the discipline has to be fair to society, both in terms of protecting the public from unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer.* In that regard, the Respondent is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of the

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71. The fact that the Respondent believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits discusses ***supra***.

Respondent's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, the Respondent is, to the best of knowledge, the only spanish speaking or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. When the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the instant case. Indeed, references to the Respondent's Colombian heritage have not been placed in the record by the Complainant for his benefit, or for the benefit of this state's large hispanic population.

Second, the punishment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing this action and its myriad procedural deficiencies in the conduct of this proceeding. Obviously, the discipline recommended has no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. In point of fact, when considered with the results

of the injunction and 2(e) sanctions, no further discouragement is required.

If the Court elects to follow this case, it should reject both the Referee's findings of fact, as clearly erroneous and not supported by clear and convincing evidence in the record as to intent, and, reject the discipline imposed.

In addition, Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991). While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that this proceeding was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar the Respondent.

The Respondent has been twice tried and punished for the offenses again charged in this action. The results of the Court's current decision would be to put the Respondent thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding takes place before a new trier of fact, see **R.M. v**

State, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served is not appropriate."

V. Prejudice Based on National Origin

E. Improper Emotional Appeal to Ethnic Background

The Referee in this matter found it important to make a factual finding that the Respondent is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Complainant have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!"

VI. Federal Questions

"3. The Court determined that the expert witness' testimony introduced by the Complainant was proper and ac-

curate concerning the Respondent's status as legal counsel to the "parties"[72] and as to the role of legal counsel as an "expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended. In this regard, the Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission rules 436(e)[73] and 478.[74] While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Exchange Commission, the federal courts or other states, the Complainant had itself indicated to the legal community in the State of Florida that in the preparation of registration statements, attorneys were not to be deemed experts,[75] thus

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72. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. See excerpts from Bremer affidavits discussed *infra*.

73. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

74. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein. Copies of Securities and Exchange Commission Rules 436(e) and 478 are annexed hereto as composite exhibit 3.

the Complainant should be estopped from taking a contrary position in this action and the Court should reconsider its legal conclusion in this matter.[76]

4. The Court failed to consider the Respondent's claim that the proceeding violated the Respondent's due process rights under the Florida[77] and United States constitutions in conjunction with:

A. The limitation by the Referee of his rights to discovery, to mandatory judicial notice and to introduction of relevant evidence; and

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75. See the lecture outline for the Complainant's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. The Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Complainant's expert, whose testimony was totally at odds with that presented by the Complainant in this seminar and publication!

76. And if it determines that a change in standards is called for, apply it prospectively only.

77. The guarantees provided in Section One, Article Sixteen, are available to Respondent's in Florida Bar disciplinary proceedings, see, *e.g.*, **Weathers v Davis**, 196 So. 487 (1940).

B. The unjustified delay by the Florida Bar in notifying the Respondent that it had reached a decision to bring this action and its attendant unjustified delay in bringing this action, especially in light of its intervening notification to the Respondent that he was in good standing with the Florida Bar."

"6. When compared with its decision in other cases, it appears that the Respondent and other minority attorneys are subjected to significantly greater penalties than other attorneys under comparable circumstances, in violation of the equal protection provisions of the Florida[78] and Federal Constitutions.

7. Former Disciplinary Rule DR1-102(A)(6) on which the Court bases its decision is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States.[79]

8. The punishment imposed by the Court against the Respondent is, under the facts of this case, violative of the Respondent's rights under the Constitutions of the State of

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78. See Florida Constitution, Article One, Section Two.

79. See amendments Five and Fourteen to the United States Constitution.

Florida[80] and the United States as impermissibly excessive and cruel.[81]"

"4. Due Process Violations Involving Discovery, Mandatory Judicial Notice, Introduction of Relevant Evidence and Unjustified Prosecutorial Delays

The Complainant and this Court are bound by the applicable guarantees of due process and equal protection imposed by the Florida and Federal Constitutions.[82] In that regard, the Respondent was entitled, during the conduct of this proceeding, to a meaningful ability to defend himself. Because this Court is the final authority on the provisions of the Florida Constitution,[83] the Respondent's discussion

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80. It violates both the excessive, cruel and unusual and the double jeopardy provisions of the Florida Constitution. Double jeopardy issues are material because, as the lost records of the Florida Bar would demonstrate, this action was initiated at the request of the Securities and Exchange Commission, and merely attempted to secure for the Securities and Exchange Commission what it failed to accomplish in its own 2(e) proceeding.

81. See amendments Five, Eight and Fourteen to the United States Constitution.

82. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see **Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions**, 447 So.2d 930 (3rd DCA 1984).

83. See the following cases where this Court found guarantees that should be applied to the instant case: The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978); Florida Bar v Randolph, 238 So.2d 635

will, instead, focus on the provisions of and interpretations of the Federal Constitution by which even this Court is bound.

The case of **Banks v Vickery**, 521 F.2d 814, 815 (1975), deals with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. While the plaintiff's did not succeed in their case, the court specifically found that states may not conserve or allocate a right to practice law;[84] and, that states cannot restrict practice of law in violation of rights to due process under federal and state constitutions.[85] In **Davis v United States** 415 F.Supp 1086 (1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings.[86] In **Fuentes v Shevin**, 92 S.Ct. 1983, 407

(1970); Lawton v State, 13 So.2d 211 (1943); The Florida Bar v Price, 478 So.2d 812 (Fla. 1985); Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Simmons, 391 So.2d 684 (1980); The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992); and, The Florida Bar v Agar, 394 So.2d 405 (1981).

84. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

85. At 1103.

86. The case specifically deals with attorneys, at pages 1091, 1092!

U.S. 67, 32 L.Ed 2d 556 (1972), the court outlawed the replevin statutes of numerous states, including Florida. Its relevance in the instant case is its holding that the constitutional rights to due process require proper notice and a timely hearing. *In the instant case, the Respondent was not provided with notice of the filing of a complaint in 1987, the only notice being a 1988 notification that the matter was being referred to a grievance committee; the Respondent was not provided with notice of the decision of the grievance committee during the fall of 1989 until receipt of a complaint in this action during August of 1991. This despite the internal requirement elucidated by this Court in the Randolph Case, that disciplinary matters be resolved within six months after initiation of an investigation.* The Respondent was therefore provided with neither meaningful notice nor a timely hearing.

In **Holman v Washington**, 364 F.2d 618 (1967), the court dealt with the use of prior evidence without a proper foundation. The court held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as well as under the applicable state constitution. It indicated that a predicate to use of such indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. *As applied in the instant case, such holding would prohibit the consideration of Bremer's testimony as to the statements*

made by Granai concerning the Respondent's statements as to Messrs. Jenkins, Baldrica and Scherer, and Bremer's statements concerning the calculations made in the Respondent's presence by Ms. Daniels, all of which have been subsequently denied in sworn affidavits.

In **Harrell v Tobriner**, 279 F.Supp 22 (USDC D.C., 1967), the Court made it clear that the practice of law is a right,[87] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience. The case of **Mooney v Holohan**, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials. It goes well with the holdings in the following Florida state cases: Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405 (1981), cited by the Complainant! The Court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process.

The Complainant has asserted that the practice of law is a privilege and not a right. That attitude is reflected in

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87. That is clearly the case under Section One, Article Two of the Florida Constitution, see **State ex rel. Sbordy v Rowlett**, 190 So.2d 59 (1939).

the manner in which the Complainant conducted this proceeding. Clearly, under federal constitutional law, that is not the case and the Respondent was entitled not to a mere hearing, but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include the right to appropriate enforcement of discovery rights,[88] to timely notice of accusations against him, to a timely hearing of charges against him, to access to mandatory judicial notice as provided by statute, to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially were competent evidence was readily available). Just as clearly, the Respondent was not provided a hearing that met such requirements.

The ability of a person to obtain a fair hearing is more difficult in an administrative setting, where the agency acts

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88. In addition to the formal restrictions imposed by the Referee on the conduct of discovery by the Respondent, he was deprived of access to most of his own records. He provided most of them to the Complainant during 1988 and such records were never returned. During 1990, in response to an inquiry from the Respondent, the Complainant notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time this proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Securities and Exchange Commission, nor the Complainant were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, legal counsel to the Complainant admitted that several years worth of its files in this matter had disappeared.

as prosecutor, judge and appellate body. In such cases, the agency must carefully monitor its agents to assure that they fully give due respect to the appropriate constitutional guarantees. The judicial regulation of law in the State of Florida is currently under strong attack. A recent newspaper article reported the formation of a rival bar association because of perceived corruption and cronyism in the Florida Bar. Judiciary control of the legal profession is too important for this Court to permit its erosion by tolerating improper conduct by the employees of the Florida Bar."

"6. Equal Protection

The director of the Florida bar as well as the members of this Court have noted that minorities are disproportionately represented in the Florida Bar, especially in positions of leadership and responsibility. Records of the results of disciplinary proceedings maintained by the Florida Bar demonstrate that minority attorneys are also disproportionately subjected to disciplinary proceedings, and that the standards applied and discipline imposed appear to be different. An analysis of this decision and those of this Court in the Randolph and McCain Cases previously cited, as well as an analysis of the punishment in many of the cases cited by the Complainant and reviewed in this motion, makes it clear that such disparity is evident in the instant proceedings.[89]

7. Unconstitutionality of DR1-102(A)(6)

The due process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[90] Such statutes, in a legal setting,

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89. See, *e.g.*, **The Florida Bar v Borja**, 609 So.2d 21 (Fla. 1992), one year suspension; **The Florida Bar v Moxley**, 462 So.2d 814 (Fla. 1985), 60 day suspension; **The Florida Bar v Simons,** 581 So.2d 154 (Fla. 1991), suspension for one year; **The Florida Bar v Adler**, 589 So.2d 899 (Fla. 1991); **The Florida Bar v Trinkle,** 580 So.2d 157 (Fla. 1991), public reprimand; **The Florida Bar v Diamond**, 548 So.2d 1107 (Fla. 1989), criminal conviction for mail and wire fraud; **The Florida Bar v Levine**, 571 So.2d 420 (Fla. 1990), criminal conviction for securities fraud, disbarrment related back to date of injunction, making defendant eligible for earlier re-admission; **The Florida Bar v Winderman,** 614 So.2d 484 (1993), suspension reduced; and, **The Florida Bar v Stalnaker,** 485 So.2d 815 (Fla. 1986), suspension. All of these cases were cited by the Complainant.

90. See **Baggett v Bullitt**, 377 U.S. 360 (1964); **Keyishian v Board of Regents**, 385 U.S. 589 (1967); **Watkins v United States**, 354 U.S. 178 (1957); **Lovell v City of Griffin**, 303 U.S. 444 (19__); **Thornhill V Alabama**, 310 U.S. 88 (1940); **Talley v California**, 362 U.S. 60 (1960); **Edwards v South Carolina**, 372 U.S. 229 (1963); **Cox v Louisiana**, 379 U.S. 536 (1965); and, **Brown v Louisiana**, 383 U.S. 131 (1966).

lend themselves "to selective enforcement against unpopular causes," see **NAACP v Button**, 371 U.S. 415 (1963).[91]

DR1-102(A)(6) provides as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102, but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Complainant to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Complainant's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[92]

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91. See also **Southeast Aluminum Supply Corp. v Metropolitan Dade County**, 533 So.2d 777 (3rd DCA 1988).

92. See also **D'Alemberte v Anderson**, 349 So.2d 164 (1977); and, **State v Wershow**, 343 So.2d 605 (1977).

8. Unconstitutionally Nature of Discipline Imposed

The eighth amendment to the Federal Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of this case, when considered with the intervening punishment to which the Respondent and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of the Respondent is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Complainant.

The case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Complainant's contentions; however, as in the case of most, if not all the cases cited by the Complainant, it does support the propositions which the Respondent has requested this Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Complainant had to establish the element of intent by clear and convincing evidence, at the final hearing, and that dis-

cipline in this case would not serve the three purpose test referred to in that case.

At the final hearing, no evidence was introduced to indicate that the Respondent intended to deceive anyone; rather, Bremer, the Complainant's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the Referee's findings of fact concerning issues of the Respondent's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[93]

With reference to discipline, the Court held that it had to meet three tests:

First, the discipline has to be fair to society, both in terms of protecting the public from unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer.* In that regard, the Respondent is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of the

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93. The fact that the Respondent believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits discusses *supra*.

Respondent's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, the Respondent is, to the best of knowledge, the only spanish speaking or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. When the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the instant case. Indeed, references to the Respondent's Colombian heritage have not been placed in the record by the Complainant for his benefit, or for the benefit of this state's large hispanic population.

Second, the punishment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing this action and its myriad procedural deficiencies in the conduct of this proceeding. Obviously, the discipline recommended has no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. In point of fact, when considered with the results

of the injunction and 2(e) sanctions, no further discouragement is required.

If the Court elects to follow this case, it should reject both the Referee's findings of fact, as clearly erroneous and not supported by clear and convincing evidence in the record as to intent, and, reject the discipline imposed.

In addition, Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991). While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that this proceeding was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar the Respondent.

The Respondent has been twice tried and punished for the offenses again charged in this action. The results of the Court's current decision would be to put the Respondent thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding takes place before a new trier of fact, see **R.M. v**

State, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served is not appropriate.

9. Discussions of Case Law Cited by the Complainant

In the Warehouse 2(e) proceeding, Judge Regensteiner found that the Enforcement Division of the Securities and Exchange Commission had appalled him by citation of cases for propositions which they did not support. The Respondent respectfully suggests that the same problem exists in this action, and that the Court should reconsider its decision in light of the real holdings. The Respondent will first deal with the federal cases and then with state cases.

A. Liability of Attorneys

The case of **Aaron v SEC**, 346 U.S. 680 (1980), determined that Section 17(a) of the Securities Act of 1934, as amended, requires a finding of scienter, except as to sellers under sections (a)(2) and (3), see Burger concurring opinion at (2), CCH page 97,685. **Pinter v Dahl**, 108 S. Ct. 2063 (1988), found attorneys performing mere legal functions were not "sellers." As a result of those two cases, many of the older cases cited by the Complainant were overruled or became inappropriate as precedent.

The case of **Capital Gaines Research Bureau, Inc.**, 375 U.S. 180 (1963), cited by the Complainant, involved interpretation of the provisions of the Investment Company Act, an act not involved in either the Warehouse cases nor this Florida Bar disciplinary proceeding. In addition, the Complainant's interpretation of this case was rejected, with reference to any applicability to actions under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, by the United States Supreme Court in **Aaron v SEC**, 346 U.S. 680 (1980), and in **Pinter v Dahl**, 108 S. Ct. 2063 (1988).

The case of **Ohio Drill & Tool Co. v Johnson**, 625 F.2d 738 (6th Cir. 1980), is not law in the 11th Circuit, of which the State of Florida is a part, having been decided 13 years ago (prior to both the Aaron and Pinter Cases) by the United States Court of Appeals for the Sixth Circuit. The only aspect of the case that has any bearing on the case at bar is that the Court found that directors who had diverted opportunities from their corporation had not acted with *actionable recklessness under Section 10(b) of the Securities Exchange Act of 1934, as amended, or Rule 10b-5 promulgated thereunder.*

The case of **SEC v Blavin**, 760 F.2d 706 (6th Cir.

1985), was cited by the Complainant in conjunction with the acceptability, for federal securities law purposes, of recklessness as a substitute for scienter. It must, in the case at bar, be construed taking into account the specific role of the Complainant itself in the factual setting, *i.e.*, that it refused to reschedule a hearing on the day of the Warehouse closing, making it physically impossible for the Respondent to engage in the careful and prudent verification activities which the Complainant and its purported expert found necessary to avoid recklessness. The Complainant must be estopped from claiming that the Respondent was required to spend time that it itself made impossible to spend. The Blavin case is not law in the 11th Circuit, of which the State of Florida is a part, having been decided 8 years ago (prior to the Pinter Case) by the United States Court of Appeals for the Sixth Circuit. It dealt with an unregistered investment advisor and thus, based on the Supreme Court's reasoning in the Pinter Case, has no relevance as to the conduct of an attorney. Furthermore, in light of the United States Supreme Court's subsequent finding that the Constitutional guarantee of freedom of the press apply to publications dealing with securities, the case appears to have been overruled.

B. Improper Mail Fraud Analogy

The case of **United States v Sanders**, 266 F.Supp. 615 (W.D. La. 1967), and the Complainant's argument buttressed thereby at page 37 of its brief, actually supports a finding by this Court that the Warehouse injunction and 2(e) decisions should have been dismissed, as to the Respondent. Because the facts at the hearing below reflect that the Respondent never used the mails with reference to any Warehouse related matters, then the following sentence by the Complainant: "*And the use of the mails in furtherance of such evil is incidental and a requirement for jurisdictional purposes ....*" totally defeats its case, and requires a finding that the Respondent has suffered improperly for more than eight years. The only two things which it has been demonstrated the Respondent did in the Warehouse affair was prepare a handwritten draft of suggested changes to a pending registration statement, hand delivered to Mr. Bremer, and, a disbursement instruction letter, hand delivered to participants at the Warehouse closing, after it had commenced.

C. Weight as Evidence of Prior Warehouse Cases

The case of **SEC v National Student Marketing Corp.**, 457 F.Supp. 53 (D.C. 1987), was cited by the

Complainant only to indicate that the Respondent had miscited it, while failing to explain how. The case, in fact, demonstrates that, contrary to the Complainant's allegation that a standard of proof at least as high as the clear and convincing standard was applicable in the Warehouse injunction case, such standard had been specifically rejected in the National Student Marketing Case as to injunction actions, see page 683 (headnote 3), page 701, "*In determining whether the Commission has shown a violation of the securities laws by the defendants, the Court will employ a preponderance of the evidence standard of proof*. Note 43 at page 701 makes it clear that such standard of proof was envisioned as applying in actions against lawyers.

The case of **SEC v Spectrum, Ltd.**, 489 F.2d 535 (2d Cir. 1973), involved reversal of a motion for summary judgment denying the Securities and Exchange Commission a requested injunction against an attorney. A decision reversing summary judgment is invalid as precedent for a proposition that the opposite result was warranted. As importantly the case is a 1973 case from the United States Court of Appeals for the Second Circuit. It was thus decided prior to the Supreme Court's decisions in the Pinter, Aaron and Hochfelder cases and is useless as precedent for the Complainant. *It does, however, indicate that in the Second Circuit, reviewing courts do not grant as much presumptive correctness to summary judgment factual*

determinations by trial courts as the Complainant asserts is the case in Florida. The Court held, at page 540 of its decision, that "[a]s in Dopp, *we need give no special deference to the district court's finding that there were no material issues of fact in dispute for 'we are in as good a position as [he] to read and interpret the pleadings, affidavits and depositions.'"* Contrary to the Complainant's assertion that the Warehouse injunction action should be given as great a deference as if it had been decided based on the "beyond a reasonable doubt" standard, this Court should grant it no deference at all! Especially since the Warehouse decision was, in fact, a decision by a district court subject to appeals to the Second Circuit, and thus, a decision governed by this case."

10. Miscellaneous Matters

A. Criminal Conduct

This Court has based its decision, in part, on a determination that the Respondent's otherwise applicable duty of confidentiality, was superseded because the conduct of the participants in the Warehouse matter was criminal, regardless of whether or not a criminal proceeding was ever initiated. In that regard the Court is respectfully requested to note that Bremer testified that at the closing, there was no intent by anyone to engage in any improper conduct, and

that intent is a critical element in the commission of a crime. Thus, not only has a criminal action never been initiated, but the Complainant's own witness in chief has testified in a manner making such a determination inappropriate. All other participants in the Warehouse closing who have been subject to Securities and Exchange Commission proceedings have vigorously denied any wrongful intent. There is utterly no evidence indicating that the Respondent was aware that anyone intended to engage in criminal conduct, and therefore, the Court's decision must be reconsidered.[94]"

"*E. Improper Emotional Appeal to Ethnic Background*

The Referee in this matter found it important to make a factual finding that the Respondent is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Complainant have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the

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94. The Court has indicated that the Respondent was obligated to notify investors of a number of facts, however, it has ignored the fact that the Respondent could not, on his own, modify the Warehouse registration statement and that the Respondent had no way of knowing who the investors were. Furthermore, the timing involved and the overlapping hearing which the Complainant refused to reschedule made any such attempt impossible.

Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and this Court should not align itself with such blatant impropriety; especially when the Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attorneys in our legal system!"

Petitioner's Motion to Dismiss or for Summary Judgment

1. Original Motion

"**COMES NOW THE RESPONDENT**, William A. Calvo, III, *pro se*, and, pursuant to the provisions of Rules 1.420 and 1.510 of the Florida Rules of Civil Procedure, respectfully requests that the Referee dismiss the portions of the Complainant's complainant remaining after dismissal of the portions thereof subject to the Complainant's motion for Voluntary Partial Dismissal of Complaint. In support of his motion, the Respondent hereby incorporates by reference the arguments reflected in his initial and reply briefs to the Supreme Court appealing the referee's order limiting issues at trial, copies of which have been heretofore provided to the referee, and, in addition, states as follows:

1. On or about April 27, 1992, after the filing of the Respondent's reply brief with the Supreme Court in this matter, the Complainant filed a motion with the Referee for Voluntary Partial Dismissal of Complaint (the "Motion").

2. The Motion acknowledges that the Complainant's Answer Brief in this matter was materially inaccurate as to a material matter at issue.

3. The defect is fundamental to the Respondent's case and justifies a full dismissal of the Complainant's complaint in this matter.

4. Bar counsel has been forthright in admitting its error to the Referee; however, Bar counsel's error in this matter corresponds exactly with the allegations against the Respondent. Bar counsel claims that his material error was based on reliance on prior counsel and inadequate time to diligently review his files. The Respondent also inherited a project and did not have time to conduct a due diligence investigation into the facts that were misrepresented to him during the two business day period that took place in April of 1985. Unlike bar counsel, the Respondent had an extremely limited time frame in which to work which was beyond his control (rather than a self imposed deadline to file a complaint). It would be highly inappropriate to recognize factors mitigating bar counsel's failure to comply with the Florida Bar's Disciplinary Rules in this matter, without also recognizing that such factors applied to the Respondent.

5. Among the Respondent many affirmative defenses and mitigating factors reflected in his answer to the Complainant's Complaint, the Respondent stated as follows:

"**Twelfth**: *The Florida Bar Has not Brought This Proceeding in a Timely Manner*

1. The matters which are the subject of this proceeding occurred during the period commencing in the fall of 1984 and ending on April 22, 1985.

2. The Securities and Exchange Commission began its well publicized suit in this matter during April of 1986, and shortly thereafter, contacted the Florida Bar.

3. The injunction against the Respondent was entered in 1987.

4. The Securities and Exchange Commission's administrative proceeding was initiated in 1988 and the penalty imposed thereby was completed in 1990. The Florida Bar also conducted its investigation of this matter during 1988 - 1989, an investigation in which the Respondent fully cooperated.

5. As a result of the foregoing proceedings, the Respondent's reputation was badly and unfairly tarnished, his practice was destroyed and he was impoverished.

6. At the beginning of 1991, the Respondent again started his practice, after paying severe and undeserved penalties as a result of the Warehouse matter.

7. The Respondent has, in conjunction with the Warehouse matter, already been subjected to the following `punishment:'

   (a) He has settled an action with a trustee for Warehouse by paying $25,000 (where his firm, not the Respondent had received a fee of only $15,000);

   (b) He has been subjected to a permanent injunction, barring him from committing future mistakes involving securities laws; and

   (c) He has endured an administrative bar to practice or appearance before the Securities and Exchange Commission until July of 1990.

8. It is unconscionable to permit the Florida Bar to have delayed so long in bringing these proceedings, and to seek to cause further injury to the Respondent."

6. The Motion filed by Bar counsel admits that the Complainant has failed to comply with the procedural re-

quirements for bringing this action and thus establishes the Respondent's defense of laches reflected in the foregoing paragraph and supports a dismissal of this action.

7. The two remaining charges against the Respondent allege violations of repealed provisions of the Florida Bar's Rules. The charges pertaining to Rule 1-102(A)(1) prohibit violation of a disciplinary rule, however, all specifications pertaining to disciplinary rules other than to former DR 1-102(6) are being dismissed. DR Rule 1-102(A)(6) pertains to engaging in any other conduct that adversely reflects on fitness to practice law, a catch all provision that is not a part of the current Bar Rules and would be constitutionally deficient as the Complainant would seek to apply it in this matter.

8. Based on Bar counsel's admissions and the large quantity of mitigating factors in this case, the Complainant's complaint should be dismissed, as requested by the Respondent."

2. Reply Brief

"**COMES NOW THE RESPONDENT**, William A. Calvo, III, *pro se*, and replies to the Complainant's

Response to the Counter Motion to Dismiss Complaint or For Summary Judgment. For purposes of clarity, the Respondent will address the issues raised by the Complainant in the order presented:

1. The Complainant totally distorts the Respondent's argument. The Respondent has no objection to dismissal of the portions of the complaint requested by the Complainant, rather, he indicates that the Complainant's conduct in preparing and filing a materially false complaint has greatly prejudiced the defense of this matter and that the remaining allegations must be dismissed since the rules on which they are based have been repealed and, in the case of the only substantive rule, DR 1-102(A)(6), have not been re-enacted.

   Where a statute (or rule) is repealed without a re-enactment of the repealed law in substantially identical terms, the repealed provision is, as to its operative effect, considered as if it had never been enacted. Neither courts nor other adjudicatory officials have power to perpetuate a repealed rule or law.[95] Repeal of laws regulating conduct nullify all proceedings had under them.[96]

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95. See generally 73 Am. Jur. 2d, Statutes Section 384.

96. See generally Fla. Jur. 2d, Criminal Law, Sections 18 and 19.

Repeal of a statute or rule is presumed when the statute is the subject of a total legislative overhaul, see Flord v State, 129 So. 861 (Fla. 1930); Fort v Fort, 104 So.2d 69 (DCA 1, 1958). Repealing statutes should be given retrospective operation, see Yaffee v International Co., 80 So.2d 910 (Fla., 1955).

When the jurisdiction of a court depends on the jurisdiction of a statute that has been repealed, the jurisdiction falls even over pending cases, see State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964).

Clearly, the repeal without re-promulgation of DR 1-102(A)(6), requires that the Complainant's complaint now be dismissed.

2. Please see paragraph one above.

3. The Complainant's citation to rule 3-7.11(a) is somewhat confusing. The Respondent has been unable to find even one case where violations have resulted in a finding that either the Florida Bar, its employees or the Supreme Court are in contempt and it appears such a finding is outside the realm of reason with reference to

the Supreme Court. The citation is to the general rules of procedure and the interpretation thereof by the Complainant is not reasonable with reference to the allegations in the Respondent's motion. Rule 3-7.4 specifically regulates grievance committee proceedings and must be complied with. More specifically, the Complainant ignores the requirement that the complaint be signed by the presiding member of the grievance committee [see Rule 3-7.4(j)].

The Complainant's statement that the Respondent has failed to demonstrate how he has been prejudiced by the Complainant's delays cannot be made in good faith and perhaps the Respondent is wrong in believing that in the prosecution of this action, the Complainant is bound by the same rules that apply to the Respondent and all other attorneys practicing before the Courts of the State of Florida, including, without limitation, those reflected in the following Rules of Professional Conduct: Rule 4-3.3,[97] 4-3.4[98] and 4-3.8;[99] and, those reflected in the Rules of Appellate Procedure.

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97. Candor Toward Tribunal.

98. Fairness of Opposing Party and Counsel.

99. Special Responsibilities of a Prosecutor.

The Respondent incorporated the arguments in his appellate brief and appellate reply brief into his motion as support therefor. In his reply brief, the Respondent stated:

"The Complainant asserts that its delay in bringing this proceeding has not resulted in harm to the Respondent. That is not accurate. Had the Complainant acted in a timely manner, the Respondent might not have accepted the results of the administrative proceeding. He might not have moved back to Florida or resumed his practice of law.[100]

The Complainant did not comply with the requirements of of Florida Bar Rule 3-7.4(j).[101] The Respondent was not informed of the findings of the grievance committee[102] until August of 1991.[103] The Com-

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100. By moving back to Florida, the Respondent and his family trusted others to manage his wife's business in North Carolina, a business which as a result of mismanagement or dishonesty by the persons left in charge is now in bankruptcy.

101. Which provide that:

"If a grievance committee finds that there was probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding.

102. Whose deliberations were held during June of 1989.

plainant incredibly argues that such delays were of benefit to the Respondent.[104] That argument is utterly without merit and the injuries to the Respondent as a result of the Complainant's improper delays in violation of the doctrine of Laches and of the specific requirements of Florida Bar Rule 3-7.4(j) require that the Complainant's complaint be dismissed. If the Complainant's case should be dismissed, then the Referee's ruling is clearly in error."

In light of the foregoing, the Complainant's argument cannot be advanced in good faith.

The Complainant's arguments pertaining to the applicability of the doctrine of latches are also not persuasive, especially in light of the fact that the passage of seven years have included a repeal of the rules on which it seeks to rely. The fact is that:

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103. The Complainant's unsupported allegation that the Respondent knew of the grievance committee's decision in 1989 is untrue. He was made aware of such fact in conjunction with the Complainant's initiation of this proceeding.

104. That argument is analogous to an argument that it would be proper form and for the benefit of an innocent third party for the owner of a vehicle who knew that a person without authority to sell such vehicle was selling it to the innocent third party to wait until after such sale to inform the third party of the title deficiency.

(a) The failure of the Complainant to file a proper complaint in this action or to initiate this action on a timely basis has given rise to the situation complained of;

(b) The Complainant has had knowledge of the conduct complained of since late in 1985, and did not initiate this proceeding until 1991. It also had full knowledge of the intervening Securities and Exchange Commission proceeding and the consequences thereof;

(c) The Respondent had no knowledge that the Complainant would assert the causes of action on which this proceeding is based; and

(d) The Respondent will suffer prejudice if this proceeding is not barred (that being the only discernible goal of this proceeding).

The Complainant's assertion that valid and proper notice of the two year old alleged decision by the grievance committee was provided by delivery of the obviously defective complaint in this action is ludicrous, especially in light of the admissions in the Complainant's motion to dismiss.

4. The Complainant's argument that injection of mitigating factors in a motion for summary judgment is premature is without legal or logical support. If the Referee believes that the Complainant's conduct of this proceeding has been improper or reckless and that such conduct, as well as the intervening punishment resulting from the Securities and Exchange Commission's 2(e) proceeding justify a termination of this proceeding, he is utterly justified in dismissing this proceeding. If the Referee further reviews the mitigating factors cited by the Complainant, he will find that this is the unusual case where they all apply!

5. The Complainant's assertions pertaining to ex post facto laws is laudable. It is regrettable that the Complainant does not realize that its position with reference to Rule 3-4.6 which led to the Referee's order involved the identical issue. The Complainant has, however, ignored the corollary to the prohibition against enforcing ex post facto rules, that being the unenforcibility of repealed rules, as discussed in paragraph one."

Excerpts from Petitioner's Interrogatories)

"Respondent, William A. Calvo, III, *Pro Se*, hereby propounds the following interrogatories to the Complainant, pursuant to Rule 1.340 of the Florida Rules of Civil Procedure. In the event that, with reference to questions predicated on whether or not a certain statement was reflected in testimony of any person, the Complainant is of the opinion that it was not, please specify what such testimony was with reference thereto and on what specific testimonial instrument such conclusion is based, citing to the proper line and page.

1. Please indicate, based on all information currently in possession of the Florida Bar, what the testimony of Gary C. Granai, Esquire, was to the Securities and Exchange Commission during investigative stage testimony or depositions in the warehouse Case, concerning the following matters:

(a) The role of Robert Beers, Esquire, or his firm:

(1) As legal counsel to the underwriter in the Warehouse offering?

(2) In conjunction with preparation of the underwriting documents used during the Warehouse offering?

(b) The compensation paid by Warehouse or Granai to Mr. Beers or his firm or partners in conjunction with the warehouse offering?

(c) The role of Nina Gordon as an attorney in conjunction with the Warehouse offering?

(d) Any statements to the effect that Ms. Gordon "she was the SEC" in the Respondent's law firm and actually did the Warehouse prospectus work.

(e) Whether or not, to Granai's knowledge, the Respondent was notified when the Warehouse offering became effective.

(f) Whether or not there was significant communication with the Respondent during the Warehouse offering period.

(g) Whether or not Bremer claimed to have advanced funds to Warehouse prior to the closing.

(h) (1) Whether or not Bremer claimed to have been entitled to reimbursement for funds advanced to Warehouse from proceeds of the Warehouse offering.

(2) If so, whether or not the funds that Bremer claimed entitlement to reimbursement for were, according to Bremer, spent for items disclosed in the use of proceeds section of the Warehouse registration statement and the Respondent;

(3) Whether or not the respondent "put Bremer through the hoops" with questions designed to verify if the reimburseable expenses claimed by Bremer represented expenditures for items disclosed in the use of proceeds section of the Warehouse prospectus;

(4) Whether or not Granai claimed to have verified from personal observations that Bremer had advanced funds to Warehouse for expenditures disclosed in the use of proceeds section of the Warehouse registration statement.

(i) (1) Whether or not the Respondent advised Granai that certain kinds of transactions would not be proper

in conjunction with the Warehouse closing; and, if so

(2) Whether or not any transactions considered were not effected as a result of the Respondent's advice.

(j) Whether or not the Respondent's views concerning the legality of the purchase of stock by Bremer affiliates was predicated on facts presented by Granai or Bremer?

(k) Whether or not the Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were held in good faith?

(l) Whether or not the difference between raising public funds to purchase goods or services, as opposed to paying debts associated with the purchase of identical goods or services, is a material difference requiring supplemental disclosure?

(m) Whether or not the Respondent was led to believe that the Warehouse offering was going to be closed at the maximum, rather than minimum offering amount?

(n) Whether or not Warehouse rejected as untimely a purported subscription for an additional $250,000 in

Warehouse stock from a broker by the name of Kalinowski, because the wire had not been received by the 2:00 p.m. closing deadline established by the Barnett Bank as the escrow agent?

(o) Whether or not the respondent's legal fee was $15,000 for services rendered to Warehouse, not the underwriter, in conjunction with preparation of changes reflected in post effective amendments to the Warehouse registration statement?

(p) Whether or not the Respondent understood his firm's legal fees were payable whether or not the offering successfully closed?

(q) Whether or not the Respondent, upon being informed of the Bremer indictment, advised that the Warehouse registration statement would have to be amended and that Bremer should resign from Warehouse?

(r) Whether or not the Respondent knew that the Warehouse offering was being continued after the Bremer indictment?

(s) Whether or not the Respondent was told immediately prior to the closing that the Bremer indictment had

either been dropped or was in the process of being dropped?

(t) Whether or not Granai had been unable to communicate with the United States attorney responsible for the Bremer indictment, despite efforts to do so because Mr. McDonald was not allowed to discuss the case.

(u) (1) Whether or not Granai ever indicated that the reason he did not specify that the Bremer indictment had been dropped in his closing opinion was because he had been replaced as criminal counsel to Bremer by a politically influential attorney; and if so,

(2) Whether or not Granai ever testify with reference to such issue that "I [Granai] can not have all the information. Bremer has other counsel."

2. Please indicate, based on all information currently in possession of the Florida Bar, what the Bremer Tape transcripts disclose concerning the following matters:

(a) Whether or not Gallagher & Company was represented by or relied on a number of law firms in the Warehouse offering, including an attorney in Denver

and Messrs. Beers and Wilkes of the Beers firm in New York?

(b) Whether or not Mr. Gallagher dealt with an attorney other than the Respondent in conjunction with questions as to the "minimum offering" and closing thereon?

(c) Whether or not Ms. Francesca Daniels, a financial consultant and friend of the Respondent, could have arranged to properly close the offering, had the participants elected to use her services?

(d) Whether or not Bremer deliberately deceived Gallagher with reference to the minimum offering by referring to faked conversations with the Securities and Exchange Commission?

(e) Whether or not Bremer plotted to close the offering notwithstanding any opinion that the Respondent might have with reference to the indictment of Bremer?

(f) Whether or not Bremer and Granai deliberately plotted to keep the Respondent ignorant of the proposed closing until the last minute, when the Respondent would be physically unable to discover adverse facts or prevent the closing?

(g) Whether or not all participants thought the final date for the closing was April 22, 1985?

(h) Whether or not Bremer plotted the fraudulent closing scenario without participation or knowledge by the Respondent, significantly prior to April 19, 1985?

(i) Whether or not Bremer ever appeared to lack respect for the truth?

(j) Whether or not Bremer plotted with Granai to assure that Gallagher would not find out about the illegal loans?

(k) Whether or not Bremer claimed to have put a lot of money into Warehouse?

(l) Whether or not Bremer discussed the delay in closing directly with members of the Securities and Exchange Commission's Boston regional Office prior to the closing?

(m) Whether or not Bremer and Granai failed to keep commitments to provide verifying information made to Gallagher and the Respondent prior to the closing?

(n) Whether or not Bremer told anyone that:

(1) He had been entitled to reimbursement for advances to Warehouse directly from closing proceeds, and, if so, whether or not

(2) He had factored such receivable and arranged for an affiliate to invest in Warehouse with the proceeds?

(o) Whether or not upon discovery that there had been a problem with the Warehouse closing, the Respondent's requested that trading in Warehouse be stopped?

(p) Whether or not Bremer lied to the Respondent concerning the basis for the Securities and Exchange Commission's investigation of the Warehouse closing?

(q) Whether or not Bremer claimed to anyone that he was innocent of the charges reflected in the indictment that was a subject of the complaint against the Respondent?

(r) Whether or not the Respondent believed everything involving the Warehouse offering was proper during the unscheduled meeting in the respondent's office on April 19, 1985?

(s) Whether or not the sums paid to Bremer's order (*i.e.*, to Richmond) from the offering proceeds) were paid as reimbursements for advances used for expenses disclosed in the registration statement as payable from proceeds of the offering?

3. Please indicate, based on all information currently in possession of the Florida Bar, what Edward Thomas Kalinowski, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer was looking for personal loans using the claim of entitlement to proceeds from the Warehouse closing for prepaid advertising advances significantly prior to April 19, 1985.

(b) Whether or not Mr. Granai had opined that such loans were legal.

(c) Whether or not it appeared that everyone involved believed that April 22, 1985 was the proper closing deadline.

4. Please indicate, based on all information currently in possession of the Florida Bar, what Marvin Richmond, in his testimony and depositions for the Securities and Ex-

change Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not he verified that he would be repaid for his loan to Bremer directly from the escrow proceeds at the closing, in a call to the Barnett Bank, as the escrow agent, prior to requesting verification from the Respondent?

(b) Whether or not the Respondent's Disbursement Instructions Letter to Barnett Bank, as the escrow agent, arrived at the offices of Barnett Bank after the escrow agent had made arrangements for the closing, in the afternoon of April 22, 1985?

(c) (1) Whether or not Mr. Richmond discussed the nature of his loan to Bremer with Barnett Bank's representative in charge of the Warehouse closing, prior to the closing, and if so

(2) Whether or not Mr. Richmond disclosed his profit on the transaction?

(d) Whether or not the Respondent ever discussed with Mr. Richmond that he had been led to believe that Messrs. Richmond and Bremer were long time acquaintances.

(e) Whether or not the Respondent played any role in arranging the Richmond transaction, other than confirming the contents of the Disbursement Instructions Letter to Richmond in a telephone conversation.

(f) Whether or not The Respondent ever indicated to Mr. Richmond that he believed the Richmond loan involved the factoring of a Bremer receivable.

(g) Whether or not Mr. Kalinowski vehemently claimed to be awaiting a $250,000 wire for deposit into the escrow account at the closing, and was extremely upset when the closing was not extended in order to accommodate his clients' subscriptions.

(h) Whether or not Barnett Bank's representative was responsible for the closing.

(i) Whether or not the Respondent arrived at Barnett Bank's offices after the participants had broken for lunch.

5. Please indicate, based on all information currently in possession of the Florida Bar, what Raymond Crane, in his testimony and depositions for the Securities and Exchange

Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer ever indicated to him that the Warehouse offering was going to be oversubscribed, rather than merely closing at the minimum offering.

(b) Whether or not Bremer was soliciting personal loans at least three weeks prior to the closing, claiming that the transactions were totally legal.

(c) Whether or not Barnett Bank was responsible for the closing.

(d) Whether or not Bremer paid Crane, out of everyone's view.

(e) Whether or not Bremer lied to Crane concerning the reason for the Securities and Exchange Commission's investigation of Warehouse, claiming that it was caused by Gallagher's refusal to sell the stock purchased by Bremer's affiliate at the closing.

(f) Whether or not the closing had been scheduled for April 19, 1985, but was postponed until April 22, 1985.

6. Please indicate, based on all information currently in possession of the Florida Bar, what Donald Ehrlich, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer lied concerning the nature of the Securities and Exchange Commission's investigation into the Warehouse matter.

(b) Whether or not Richmond believed that the loan to Bremer was legal.

(c) Whether or not Bremer intended to violate securities laws by paying compensation not disclosed in the Warehouse registration statement, withholding such information from his attorneys.

(d) Whether or not Bremer claimed to have exhausted his personal funds in making advances to Warehouse.

(e) Whether or not immediately prior to the closing, Gallagher believed that the minimum offering had been subscribed to.

(f) Whether or not Bremer claimed that the minimum offering had been subscribed to during the week prior to the Warehouse closing.

(g) (1) Whether or not he was present during an informal social gathering at a Fort Lauderdale waterfront restaurant (Shooters) at which the Warehouse party and the Respondent met, and if so

(2) Whether or not there was any discussions of loans or closing gimmicks.

(h) Whether or not Messrs. Bremer or Granai claimed that they, rather than Gallagher, had been responsible for the success of the Warehouse closing.

7. Please indicate, based on all information currently in possession of the Florida Bar, what Dean Scholl, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Granai was a securities and investments attorney.

(b) Whether or not Granai's background as an Annapolis graduate and naval officer lent him a presumption of credibility.

(c) Whether or not he ever had discussions concerning Warehouse with the Respondent.

(d) Whether or not the structure of his proposed involvement with Warehouse was changed, on or about April 10, 1985, when it was determined that a subscription and guaranteed buy back would not be legal.

(e) (1) Whether or not Granai described that a loan transaction to Bremer, repaid from proceeds legally obtained by Bremer at closing would have been legal, and if so

(2) Whether or not that concept was developed by Granai, Bremer and him, during a meeting on or about April 10, 1985.

(f) Whether or not he relied on Barnett Bank's involvement in the offering in making his investment decision.

(g) Whether or not Scholl ever disclosed his role as a lender in the Warehouse offering to the Respondent.

8. Please indicate, based on all information currently in possession of the Florida Bar, what John J. Stewart, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated concerning:

(a) Whether or not Bremer lied to him concerning the nature of the Securities and Exchange Commission's investigation of Warehouse.

(b) Whether or not Bremer was looking for bridge loans for Warehouse during March of 1985.

(c) Whether or not Bremer claimed that Warehouse had incurred significant expenses during the offering for advertising, mail order catalogues and in connection with a Radio Shack contract.

(d) Whether or not Bremer claimed to have receivables from the Warehouse closing with which he could collateralize loans.

(e) Whether or not a major element giving the proposed loan transaction credibility was the participation of Barnett Bank as the escrow agent.

9. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission's administrative law judge in the Respondent's 2(e) proceeding found that:

(a) The Respondent had been deceived by Messrs. Bremer and Granai.

(b) The Respondent's demeanor, the testimony of his witnesses and the suffering occasioned to him and his family as a result of the Warehouse matter mitigated against a permanent bar preventing the petitioner from practicing before the Securities and Exchange Commission.

(c) The conduct of the Securities and Exchange Commission's staff in the 2(e) proceeding was appalling in that they deliberately distorted materials presented to the judge in support of their case.

(d) He was not free to consider the underlying facts, as a result of Securities and Exchange Commission rules.

9. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Respondent has fully complied with the penalties imposed by the

Securities and Exchange Commission's administrative law judge in the 2(e) proceeding.

10. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the decision in the Securities and Exchange Commission's 2(e) proceeding was based on the findings of fact of the District Court in the Warehouse case.

11. Please indicate, based on all information currently in possession of the Florida Bar, the decision of the District Court in the Warehouse case was purportedly based exclusively on the Respondents admissions. If not, please indicate on what testimony other than admissions by the respondent the decision was based.

12. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the admissions on which the District Court based its decision against the petitioner in the Warehouse matter are governed by Rule 36 of the Federal Rules of Civil Procedure.

13. Please indicate, based on all information currently in possession of the Florida Bar, whether or not, by its terms, Rule 36 of the Federal Rules of Civil Procedure specifically provides that admissions made thereafter are effective only for such case, and cannot be used for any other purpose.

14. Please indicate, based on all information currently in possession of the Florida Bar, whether or not, if the decision of the Securities and Exchange Commission's administrative law judge was based on a decision exclusively relying on admissions provided under Rule 36 of the Federal Rules of Civil Procedure, such decision was improper.

15. Please indicate, based on all information currently in possession of the Florida Bar, whether or not there is any evidence of any wrongdoing or improper behavior by the Respondent since resumption of his practice upon termination of his bar against practice before the Securities and Exchange Commission.

16. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission is barred from regulating the practice of law by the Administrative Procedures Act.

17. Please indicate, based on all information currently in possession of the Florida Bar, whether or not the Securities and Exchange Commission claims or has ever claimed that proceedings under Rule 2(e) are legal because they do not involve regulation of the legal profession but rather, merely

regulate the Securities and Exchange Commission's internal procedures of practice."

Excerpts from Petitioner's Request for Production of Documents & Request for Admissions

"Pursuant to the provisions of Rules 1.280, 1.350 and 1.370 of the Florida Rules of Civil Procedure, the Respondent hereby demands that the Complainant:

(a) Produce the following described documents, at the Respondent's offices located at 11203 Southeast 53rd Court, Belleview, Florida 32620, on the 8th day of October, 1991, at 5:00 p.m., or mail photocopies thereof certified as accurate to the Petitioner's mailing address, 4488 Southwest 44th Court; Ocala, Florida 32674 by such date and time:

1. Copies of all transcripts of investigatory testimony taken by the Securities and Exchange Commission in the Electronics Warehouse case, including, without limitation, the testimony of: Gary Granai; Marvin Richmond; Edward Thomas Kalinowski; Raymond Crane; Donald Ehrlich; Dean Scholl; John J. Stewart; William A. Calvo, III; and, Michael F. Gilligan.

2. Copies of all transcripts of depositions taken by the Securities and Exchange Commission in the Electronics Warehouse case, including, without

limitation, the depositions of: Gary Granai; Marvin Richmond; Edward Thomas Kalinowski; Raymond Crane; Donald Ehrlich; Dean Scholl; John J. Stewart; William A. Calvo, III; and, Michael F. Gilligan.

3. Copies of all transcripts of telephone conversations taped by Edward Bremer and provided to the United states Justice Department, Securities and Exchange Commission or Florida Bar.

4. Copies of all affidavits, notes, correspondence, or other tangible materials collected by the United States Justice Department, Securities and Exchange Commission or Florida Bar in conjunction with investigation of the Warehouse matter or preparation or prosecution of all Warehouse related cases.

5. Copies of all materials provided by the Respondent to the Florida Bar or grievance committees thereof in conjunction with this proceeding and the preliminary investigations thereof.

6. Copies of all testimonial transcripts involving proceedings related to this proceeding with which the Florida Bar has been involved.

7. Copies of all notes, memoranda or other materials prepared or reviewed by the Florida Bar's grievance committee which recommended this proceeding.

8. Copies of all notes, memoranda or other materials in the possession or control of the Florida Bar concerning the access availed of to materials provided by the Respondent to the grievance committee which recommended this proceeding, by members thereof.

9. Copies of the transcripts of the Securities and Exchange Commission's 2(e) proceedings against the Respondent, including the exhibits introduced thereat.

10. A copy of the decision by the Securities and Exchange Commission's administrative law judge in the 2(e) Proceeding against the Respondent, including all footnotes thereto.

11. Copies of all other materials which the Complainant intends to use, directly or indirectly, in conjunction with prosecution of this proceeding.

(b) That the Complainant admit the genuiness of all the documents reflected in paragraph (a) above and the admissibility in this proceedings of any excerpts therefrom selected by the Respondent.

(c) That the Complainant admit the accuracy of the following statements, and their admissibility in this proceeding:

1. That Gary C. Granai, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

   (a) Robert Beers, Esquire, and his firm served as legal counsel to the underwriter in the Warehouse offering, prepared the underwriting documents used and billed $19,000 for their services.

   (b) Nina Gordon was the attorney in the Respondent's law firm principally involved with the Warehouse offering and that she was :the SEC" in the Respondent's law firm and actually did the prospectus work.

   (c) The Respondent was not notified when the Warehouse offering became effective.

(d) There was little communication with the Respondent during the Warehouse offering.

(e) Bremer claimed to have advanced funds to Warehouse.

(f) Bremer claimed to be entitled to reimbursement for funds advanced to Warehouse from proceeds of the Warehouse offering.

(g) The funds that Bremer claimed entitlement to reimbursement for were, according to Bremer, spent for items disclosed in the use of proceeds section of the Warehouse registration statement and the Respondent "put Bremer through the hoops" with questions designed to verify such fact.

(h) Granai verified from personal observations that Bremer had advanced to Warehouse for expenditures disclosed in the use of proceeds section of the Warehouse registration statement.

(i) The Respondent advised Granai that certain kinds of transactions would not be proper in

conjunction with the Warehouse closing, as a result of which they were not effected.

(j) The Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were predicated on facts presented by Granai and Bremer.

(k) The Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were held in good faith.

(l) The difference between raising public funds to purchase goods or services, as opposed to paying debts associated with the purchase of identical goods or services is not a material difference requiring supplemental disclosure.

(m) The Respondent was led to believe that the Warehouse offering was being closed at the maximum, rather than minimum offering amount.

(n) Warehouse rejected as untimely a purported subscription for an additional $250,000 in Warehouse stock from a broker by the name of Kalinowski, because the wire had not been

received by the 2:00 p.m. closing deadline established by the Barnett Bank as the escrow agent.

(o) The Respondent's legal fee was $15,000 for services rendered to Warehouse, not the underwriter, in conjunction with preparation of changes reflected in post effective amendments to the Warehouse registration statement.

(p) The Respondent understood his firm's legal fees were payable whether or not the offering successfully closed.

(q) The Respondent, upon being informed of the Bremer indictment, advised that the Warehouse registration statement would have to be amended and that Bremer should resign from Warehouse.

(r) The Respondent did not know that the Warehouse offering was being continued after the Bremer indictment.

(s) The Respondent was told immediately prior to the closing that the Bremer indictment had

either been dropped or was in the process of being dropped.

(t) Granai had been unable to communicate with the United States attorney responsible for the Bremer indictment, despite efforts to do so because Mr. McDonald was not allowed to discuss the case.

(u) The reason Granai did not specify that the Bremer indictment had been dropped in his closing opinion and merely opined that a government victory in the case was unlikely was because he had been replaced as criminal counsel to Bremer by a politically influential attorney, stating "I can not have all the information. Bremer has other counsel."

2. That the Bremer Tape transcripts disclose the following:

(a) That Gallagher & Company was represented by or relied on a number of law firms in the Warehouse offering, including an attorney in Denver and Messrs. Beers and Wilkes of the Beers firm in New York.

(b) that Mr. Gallagher dealt with an attorney other than the Respondent in conjunction with questions as to the "minimum offering" and closing thereon.

(c) That Ms. Francesca Daniels, a financial consultant and friend of the Respondent, could have arranged to properly close the offering, had the participants elected to use her services.

(d) That Bremer deliberately deceived Gallagher with reference to the minimum offering by referring to faked conversations with the Securities and Exchange Commission.

(e) That Bremer plotted to close the offering notwithstanding any opinion that the Respondent might have with reference to the indictment of Bremer.

(f) That Bremer and Granai deliberately plotted to keep the Respondent ignorant of the proposed closing until the last minute, when the Respondent would be physically unable to discover adverse facts or prevent the closing.

(g) That all participants thought the final date for the closing was April 22, 1985.

(h) That Bremer plotted the fraudulent closing scenario without participation or knowledge by the Petitioner, significantly prior to April 19, 1985.

(i) That Bremer had no respect for the truth.

(j) That Bremer plotted with Granai to assure that Gallagher would not find out about the illegal loans.

(k) That Bremer claimed to have put a lot of money into Warehouse.

(l) That Bremer discussed the delay in closing directly with members of the Securities and Exchange Commission's Boston regional Office prior to the closing.

(m) That Bremer and Granai had not met commitments to provide verifying information made to Gallagher and the Respondent prior to the closing.

(n) That Bremer told numerous persons that he had been entitled to reimbursement for advances to Warehouse directly from closing proceeds, had factored such receivable and arranged for an affiliate to invest in Warehouse with the proceeds.

(o) That upon discovery that there had been a problem with the Warehouse closing, the Respondent's first concern was for compliance with law by requesting that trading in Warehouse be stopped.

(p) That during the District Court action by the Securities and Exchange Commission against the Respondent, Bremer lied to the Respondent concerning the basis for the Securities and Exchange Commission's investigation, thereby misdirecting the conduct of the Respondent's defense.

(q) That Bremer concocted the story that he was totally innocent of the charges reflected in the indictment.

(r) That the Respondent believed everything involving the Warehouse offering was proper

during the unscheduled meeting in the respondent's office on April 19, 1985.

(s) That the sums paid to Bremer's order (*i.e.*, to Richmond) from the offering proceeds) were paid as reimbursements for advances used for expenses disclosed in the registration statement as payable from proceeds of the offering.

3. That Edward Thomas Kalinowski, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer was looking for personal loans using the claim of entitlement to proceeds from the Warehouse closing for prepaid advertising advances significantly prior to April 19, 1985.

(b) Mr. Granai had opined that such loans were legal.

(c) Everyone involved believed that April 22, 1985 was the proper closing deadline.

4. That Marvin Richmond, in his testimony and depositions for the Securities and Exchange Com-

mission pertaining to the Warehouse matter, stated that:

(a) He verified that he would be repaid for his loan to Bremer directly from the escrow proceeds at the closing, in a call to the Barnett Bank as the escrow agent, prior to requesting verification from the Petitioner.

(b) The Petitioner's Disbursement Instructions Letter to Barnett Bank, as the escrow agent, arrived at the offices of the Barnett Bank after the escrow agent had made arrangements for the closing in the afternoon of April 22, 1985.

(c) Mr. Richmond totally, completely and repeatedly discussed the nature of his loan to Bremer with Barnett Bank's representative in charge of the Warehouse closing, prior to the closing, including disclosure of his profit on the transaction.

(d) The Petitioner had been led to believe that Messrs. Richmond and Bremer were long time acquaintances.

(e) The Petitioner played no role in arranging the Richmond transaction, other than confirming the contents of the Disbursement Instructions Letter to Richmond in a telephone conversation.

(f) The Petitioner believed the Richmond loan involved the factoring of a Bremer receivable.

(g) Kalinowski vehemently claimed to be awaiting a $250,000 wire for deposit into the escrow account at the closing, and was extremely upset when the closing was not extended in order to accommodate his clients' subscriptions.

(h) Barnett Bank's representative, not the Petitioner, was responsible for the closing.

(i) The Petitioner arrived at Barnett Bank's offices after the participants had broken for lunch.

5. That Raymond Crane, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer indicated that the Warehouse offering was going to be oversubscribed, rather than merely closing at the minimum offering.

(b) Bremer was soliciting personal loans at least three weeks prior to the closing, claiming that the transactions were totally legal.

(c) Barnett Bank, not the Petitioner, was responsible for the closing.

(d) Bremer paid Crane, out of everyone's view.

(e) Bremer lied to Crane concerning the reason for the Securities and Exchange Commission's investigation of Warehouse, claiming that it was caused by gallagher's refusal to sell the stock purchased by Bremer's affiliate at the closing.

(f) The closing had been scheduled for April 19, 1985, but was postponed until April 22, 1985.

6. That Donald Ehrlich, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer lied to everyone concerning the nature of the Securities and Exchange Commission's investigation into the Warehouse matter.

(b) Richmond believed that the loan to Bremer was legal.

(c) Bremer intended to violate securities laws by paying compensation not disclosed in the Warehouse registration statement, withholding such information from his attorneys.

(d) Bremer claimed to have exhausted his personal funds in making advances to Warehouse.

(e) Immediately prior to the closing, Gallagher believed that the minimum offering had been subscribed to.

(f) Bremer claimed that the minimum offering had been subscribed to during the week prior to the Warehouse closing.

(g) He was present during an informal social gathering at a Fort Lauderdale waterfront restaurant (Shooters) at which the Warehouse

party and the Petitioner met, and there were no discussions of loans or closing gimmicks.

(h) Messrs. Bremer and Granai claimed that they, rather than Gallagher, had been responsible for the success of the Warehouse closing.

7. That Dean Scholl, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Granai was a securities and investments attorney.

(b) Granai's background as an Annapolis graduate and naval officer lent him a presumption of credibility.

(c) He never had discussions concerning Warehouse with the Petitioner.

(d) The structure of his proposed involvement with Warehouse was changed, on or about April 10, 1985, when it was determined that a subscription and guaranteed buy back would not be legal.

(e) Granai described that a loan transaction to Bremer, repaid from proceeds legally obtained by Bremer at closing would have been legal, and that the concept was developed by Granai, Bremer and him, during a meeting on or about April 10, 1985.

(f) He relied on Barnett Bank's involvement in making his investment decision.

(g) Scholl never disclosed his role as a lender in the Warehouse offering to the Petitioner.

8. That John J. Stewart, in his testimony and depositions for the Securities and Exchange Commission pertaining to the Warehouse matter, stated that:

(a) Bremer lied to him concerning the nature of the Securities and Exchange Commission's investigation of Warehouse.

(b) Bremer was looking for bridge loans for Warehouse during March of 1985.

(c) Bremer claimed that Warehouse had incurred significant expenses during the offering for

advertising, mail order catalogues and in connection with a Radio Shack contract.

(d) Bremer claimed to have receivables with which he could collateralize loans.

(e) A major element giving the proposed loan transaction credibility was the participation of Barnett Bank as the escrow agent.

7. That the Securities and Exchange Commission's administrative law judge in the Petitioner's 2(e) proceeding found that:

(a) The Petitioner had been deceived by Messrs. Bremer and Granai.

(b) The Petitioner's demeanor, the testimony of his witnesses and the suffering occasioned to him and his family as a result of the Warehouse matter mitigated against a permanent bar preventing the petitioner from practicing before the Securities and Exchange Commission.

(c) The conduct of the Securities and Exchange Commission's staff in the 2(e) proceeding was

appalling in that they deliberately distorted materials presented to the judge in support of their case.

(d) He was not free to consider the underlying facts, as a result of Securities and Exchange Commission rules.

8. The Petitioner has fully complied with the penalties imposed by the Securities and Exchange Commission's administrative law judge in the 2(e) proceeding.

9. The decision in the Securities and Exchange Commission's 2(e) proceeding was based on the decision of the District Court in the Warehouse case.

10. the decision of the District Court in the Warehouse case was purportedly based exclusively on the Petitioners admissions.

11. The admissions on which the District Court based its decision against the petitioner in the Warehouse matter are governed by Rule 36 of the Federal Rules of Civil Procedure.

12. By its terms, Rule 36 of the Federal Rules of Civil Procedure specifically provides that admissions made thereafter are effective only for such case, and cannot be used for any other purpose.

13. If the decision of the Securities and Exchange Commission's administrative law judge was based on a decision exclusively relying on admissions provided under Rule 36 of the Federal Rules of Civil Procedure, such decision was improper.

14. There is no evidence of any wrongdoing or improper behavior by the Petitioner since resumption of his practice upon termination of his bar against practice before the Securities and Exchange Commission.

15. The Securities and Exchange Commission is barred from regulating the practice of law by the Administrative Procedures Act.

16. The Securities and Exchange Commission claims that proceedings under Rule 2(e) are legal because they do not involve regulation of the legal profession but rather, merely regulate the Securities and Exchange Commission's internal procedures of practice."

Case Cited From CCH F.Sec.L.Rep., at 98,219

CCH F.SEC.L.Rep. Paragraph 98,219

Austin, et al. v. Bradley, Barry & Tarlow, P.C., et al.

United States District Court for the District of Massachusetts

Civ. A. No. 85-4767-S, April 30, 1993

Opinion in Full Text.

1. Exchange Act--Antifraud--Attorneys--Disclosure Duty.--Investors were unable to maintain a Section 10(b) claim alleging that an offering memorandum was misleading because a defendant law firm failed to disclose its knowledge of its client's insolvency. Imposing a duty on the law firm to disclose its client's insolvency to nonclient investors would conflict directly with the law firm's concurrent obligation of confidentiality to its client. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

2. Exchange Act--Antifraud--Aiding and Abetting--Attorneys.--Investors failed to establish a Section 10(b) aiding and abetting claim against a law firm that did not disclose its client's insolvency in an offering memorandum. There was no allegation that the law

firm benefited from its silence; the law firm's economic motivation, in the form of legal fees, was too remote and minimal to demonstrate that the firm's silence was designed intentionally to aid the alleged primary fraud. Also, the investors failed to refute the law firm's assertion that its silence was motivated solely by its professional obligation of confidentiality. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

Opinion of Skinner, Senior District Judge.

This case and three related actions were brought by four investors in a fall 1982 yacht sale and management offering by Ocean Limited.[105] The defendants, the law firm Bradley, Barry & Tarlow, P.C. and two of its partners, Edward T. Tarlow and Richard P. Breed, III (collectively referred to as BB & T), served as legal counsel to Ocean and prepared a significant portion of the allegedly fraudulent offering memorandum. The crux of the plaintiffs' claims against BB & T is that the offering memorandum was misleading because it failed to disclose material

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105. The three related cases are (1) Werner-Stewart, Inc. v. Ocean Limited, C.A. No. 84-0653-S (D.Mass.), (2) Austin v. Ocean Limited, C.A. No. 84-0654-S (D.Mass.). and McCurtain v. Ocean Limited, C.A. No. 84-4146-S (D.Mass.).

information regarding Ocean's insolvency and inability to fulfill future obligations under the management plan. The defendants move for summary judgment, asserting that the plaintiffs are unable to establish a material element of their remaining claims[106] --that BB & T was under any duty to disclose.

DISCUSSION

Summary judgment is appropriate where the record reveals that, " `there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " FDIC v. World Univ., Inc., 978 F.2d 10, 13 (1st Cir.1992) (quoting FED. R.CIV.P. 56(c)). Rule 56 mandates that judgment be entered against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

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106. In my June 17, 1992 order, I allowed in part BB & T's previous motion for summary judgment, which was based on alternative grounds. Austin v. Bradley, Barry & Tarlow, P.C., No. 85-4767-S (D.Mass. June 17, 1992). The remaining claims are as follows: violation of section 10(b) and Rule 10b-5 (Count I), aiding and abetting violation of S10(b) and Rule 10b-5 (Count II), common law fraud and deceit (Count VIII), aiding and abetting fraud and deceit (Count VIII), negligence (Count IX), and negligent misrepresentation (Count X). The facts relevant to BB & T's present motion, viewed in the light most favorable to the plaintiffs, were fully discussed in my June 17, 1992 order and require no elaboration.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The facts must be viewed in the light most favorable to the party opposing summary judgment. FDIC v. World Univ., Inc., 978 F.2d at 13.

1. Primary Liability

Our court of appeals has made eminently clear that "[e]ven if the information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it." Backman v. Polaroid Corp., 910 F.2d 10, 13 (1st Cir. 1990) (quoting Roeder v. Alpha Indus., Inc., 814 F.2d 22, 26 (1st Cir. 1987)). The plaintiffs here do not contend that BB & T's duty to disclose arose from any prior affirmative misrepresentations, insider trading, or violation of any statutory or regulatory disclosure requirements. See Roeder v. Alpha Indus., Inc., 814 F.2d at 27. Instead, the plaintiffs assert that the offering memorandum was misleading because BB & T remained silent, failing to disclose its knowledge of Ocean's insolvency. The plaintiffs further allege that BB & T was obliged to disclose this material information because, by preparing significant portions of the fall 1982 offering memorandum, BB & T assumed a duty to third party investors who BB & T knew would reasonably and detrimentally rely on the completeness and accuracy of BB & T's professional services. In support of the existence

of such a duty, the plaintiffs rely primarily on state law. See Camp v. Dema, 948 F.2d 455, 461 (8th Cir.1991) (fiduciary duty and corresponding duty to disclose may be established by state or federal law).

Under Massachusetts law, "an attorney owes a duty to nonclients who the attorney knows will rely on the services rendered." Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 536 N.E.2d 344, 350 (citing Page v. Frazier, 445 N.E.2d 148, 154 (Mass. 1983)), cert. denied 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989). However, courts will not infer a duty to nonclients if to do so would impose "conflicting duties on attorneys." Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015, 1018 (1993); see also Robertson v. Guston Snow & Ely Bartlett, 536 N.E.2d at 350 (" `[W]here an attorney is also under an independent and potentially conflicting duty to a client,' we are less likely to impose a duty to nonclients.") (quoting Page v. Frazier, 445 N.E.2d at 153). The record here reveals that imposing a duty on BB & T to disclose Ocean's insolvency to nonclient investors like the plaintiffs would conflict directly with BB & T's concurrent obligation of confidentiality to its client. Accordingly, I decline to infer such a duty in this case.

The plaintiffs' reliance on this court's opinion in Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259,

1265 (D.Mass.1988) (Skinner, J.), as authority for the contrary conclusion is misplaced. First, Norman was decided without benefit of the Supreme Judicial Court's recent decision in Logotheti and, as a result, did not fully consider the potential for conflicting professional obligations. Second, the focus in Norman was on the existence of a duty of reasonable care owed by an attorney to nonclient investors in a negligence context. Id. The case did not address the existence of a fiduciary or other special relationship necessary to create a duty to disclose under federal securities law. Cf. Agapitos v. PCM Invest. Co., 809 F.Supp. 939, 946 (M.D.Ga.1992) (duty of reasonable care arising under Georgia professional negligence law did not create a fiduciary relationship between parties actionable under federal securities law).

Similarly misplaced is the plaintiffs' reliance on Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) as authority for a duty to speak arising from federal common law. Unlike the present case, Ackerman involved an attorney who prepared an opinion letter containing affirmative misrepresentations. Id. at 843. While the court observed that the attorney had no duty to "blow the whistle" on his clients, the attorney was still liable for "a material lie." Id. at 848. Accordingly, the Seventh Circuit reversed entry of summary judgment to the extent the attorney permitted the promoters to release his opinion letter to investors. Id.

Simply stated, having elected to speak, the attorney in Ackerman was obliged to tell the truth. See Id.

In contrast, the plaintiffs here do not allege that BB & T made any prior affirmative misrepresentations or misleading disclosures giving rise to a comparable duty to speak. See Backman v. Polaroid Corp., 910 F.2d at 16-17 (duty to disclose arises only to correct or update what would otherwise be a materially misleading prior statement by the defendant). The plaintiffs premise BB & T's duty to speak on the allegedly misleading nature of the offering memorandum, which they alleged was misleading only because BB & T remained silent. Circular reasoning, however, is not a persuasive basis for abandoning the well-settled rule that "silence absent a duty to disclose, is not misleading under Rule 10b-5." Chiarella v. United States, 445 U.S. 222, 235, 100 S.Ct. 1108, 1117, 63 L.Ed.2d 348 (1980).

In short, the plaintiffs are unable to establish an element essential to their federal securities law claims and BB & T is entitled to summary judgment on Count I of the complaint. Absent any "fiduciary or other similar relation of trust and confidence between [the parties]," Id. at 228, 100 S.Ct. at 1114, BB & T had no duty to disclose its knowledge of Ocean's insolvency to potential investors. See Schatz v. Rosenberg, 943 F.2d 485, 490-92 (4th

Cir.1991) (". . . unless a relationship of `trust and confidence' exists between a lawyer and a third party, the federal securities laws do not impose on a lawyer a duty to disclose information to a third party."), cert. denied, U.S. , 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992); accord, Renovitch v. Kaufman, 905 F.2d 1040, 1048 (7th Cir.1990) (absent a fiduciary relationship with third party investor, law firm had no duty to disclose financial information about client to investor).

2. Secondary Liability

To establish liability as an aider and abettor of a violation of S10(b) or Rule 10b-5, the plaintiffs must establish the following three elements:

1. the commission of a violation of S10(b) or Rule 10b-5 by the primary party;

2. the defendant's general awareness that his role was part of an overall activity that is improper; and

3. knowing and substantial assistance of the primary violation by the defendant.

Cleary v. Perfectune, Inc. 700 F.2d 774, 777 (1st Cir.1983) BB & T asserts that, as a matter of law, it cannot

be held secondarily liable as an aider and abettor of securities law violations because, absent a duty to disclose, its silence cannot constitute "knowing and substantial assistance" of the primary violation. See Kline v. First W. Gov't Sec., 794 F.Supp. 542, 554 (E.D.Pa.1992).

The defendants' argument is overstated. Several courts have held that inaction or silence may constitute knowing and substantial assistance of the primary violation where the "defendant recklessly violates an independent duty to act or manifests a conscious intention to further the principal violation." See, e.g., Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 36 (D.C.Cir.1987) (citing Cleary v. Perfectune, Inc., 700 F.2d at 778). Since I have already determined that BB & T was under no independent duty to act, that is, to speak, BB & T can only be liable as an aider and abettor if its silence was consciously intended to further the principal violation.[107]

In determining whether silence was accompanied by a conscious intent to assist the primary violation, courts query whether the "defendant has thrown in his lot with the primary violators." DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir.) (quoting Barker v. Henderson,

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107. While our court of appeals has declined to expressly adopt the conscious intent standard, it has implicitly recognized the doctrine's validity. Cleary v. Perfectune, Inc., 700 F.2d at 778.

Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir.1986)), cert. denied, 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990). Crucial to this determination is "whether the alleged aider-and-abettor benefitted from such silence." See, e.g., First Interstate Bank v. Pring, 969 F.2d 891, 899 (10th Cir.1992) (collecting cases). In making these determinations, courts have been " `particularly exacting.' " Smith v. American Nat'l Bank & Trust Co., 982 F.2d 936, 944 (6th Cir.1992) (quoting Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir.), cert. denied, 483 U.S. 1006, 107 S.Ct. 3231, 97 L.Ed.2d 737 (1987)).

Viewed against these standards and in the light most amiable to the plaintiffs, the record here fails to support a finding that BB & T's silence was "consciously intended" to assist the primary violation. First there is no allegation that BB & T benefitted from its silence. Cf. First Interstate Bank v. Pring, 969 F.2d at 900 (alleged aider and abettor's silence indicated conscious intent to aid the primary violation where aider and abettor had "substantial personal stake" in success of allegedly fraudulent bond issue). While presumably BB & T received a fee for its legal services, this economic motivation alone is too remote and minimal to demonstrate that BB & T's silence was " `designed intentionally to aid the primary fraud.' " National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 207

(2d Cir.1989) (premiums received by insurance company insufficient to demonstrate conscious intent) (quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir.1983)); see also DiLeo v. Ernst & Young, 901 F.2d at 629 (accountant fees received over a two-year period found insufficient to demonstrate conscious intent on part of alleged aider and abettor). Second, the plaintiffs have failed to refute BB & T's assertion that its silence was motivated solely by its professional obligation of confidentiality. Under Rule 56, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e).

Accordingly, the defendants are entitled to summary judgment as to Count II of the complaint. See Cleary v. Perfectune, Inc., 700 F.2d at 778-79 (affirming entry of summary judgment against plaintiffs who failed to introduce any evidence demonstrating that defendants' silence was consciously intended to further fraudulent scheme).

3. State Law Claims

In light of the foregoing finding that BB & T was under no duty to disclose Ocean's insolvency to the plaintiffs, BB & T is also entitled to summary judgment on the plaintiffs' common law negligence (Count IX) and fraud (Count

VII) claims. Absent a duty to disclose, there can be no negligence or fraud arising from BB & T's silence. Maruho Co. v. Miles, Inc., No. 92-10084-Z, 1993 WL 81453, at *4, 1993 U.S.Dist. LEXIS 3321, at *10 (D.Mass. Mar. 8, 1993) ("Negligence . . . presumes a duty."); Royal Business Group, Inc. v. Realist, Inc., 933 F.2d 1056, 1064 (1st Cir.1991) (under Massachusetts law, "there can be no actionable claim of fraud for failure to disclose in the absence of a duty to disclose").

Similarly, the plaintiffs' failure to demonstrate that BB & T's silence substantially assisted the primary violation mandates that judgment be entered in BB & T's favor on the plaintiffs' state law claim of aiding and abetting fraud (Count VIII). This is because under Massachusetts law liability for aiding and abetting a tort attaches where: (1) the defendant provides "substantial assistance or encouragement to the other party;" and (2) the defendant has "unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions." Payton v. Abbott Labs, 512 F.Supp. 1031, 1036 (D.Mass.1981) (applying Massachusetts law).

Finally, with regard to the plaintiffs' claim of negligent misrepresentation (Count X), the plaintiffs have failed to demonstrate an element essential to their claim. Under Massachusetts law, a claim for negligent misrepresentation

generally requires privity between the parties. In re Bank of Boston Corp. Sec. Litig., 762 F.Supp. 1525, 1536 (D.Mass.1991). Absent privity, the plaintiffs must demonstrate that BB & T had actual knowledge of each plaintiffs' reliance. Id. (citing Hurley v. FDIC, 719 F.Supp. 27, 34 (D.Mass.1989)). The record here fails to support either requirement. Viewed most favorably, the plaintiffs have alleged only that BB & T should have reasonably foreseen the plaintiffs' detrimental reliance on the allegedly incomplete offering memorandum. This allegation falls far short of demonstrating actual knowledge on BB & T's part.

CONCLUSION

The defendants' motion for summary judgment on the remaining counts of the complaint is allowed. The clerk is directed to enter final judgment in favor of the defendants on all counts of the complaint, the defendants to recover their costs.

Case Cited From CCH F.Sec.L.Rep., at 98,110

CCF F.SEC.L.Rep. Paragraph 98,110,

In re Cascade International Securities Litigation.

United States District Court, Southern District of Florida

Case No. 91-8652-CIV-NESBITT, December 15, 1993

Opinion in Full Text.

1. Exchange Act--Antifraud--Attorneys--Disclosure Duty.--Stock purchasers were unable to maintain a securities fraud action against two law firms whose client was the issuer, in that the purchasers failed to demonstrate any kind of fiduciary relationship between the law firms and the purchasers, and thus no duty to disclose existed. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

2. Exchange Act--Antifraud--Aiding and Abetting--Attorneys.--Section 10(b) aiding and abetting claims were not adequately alleged by stock purchasers against law firms whose client was the issuer, in that the requisite degree of scienter was not alleged and "substantial assistance" was not demonstrated. "Red flags" or "aroused suspicions" do not constitute actual awareness of one's role in a fraudulent scheme. Further, the complaint failed to show how the law firms' actions of

merely rendering legal opinions or coming to the defense of their client demonstrated more than activity constituting the "daily grist of the mill" of a law firm. Lastly, the purchasers failed to allege any activities by the law firms that constituted anything more than acting as scriveners for their client. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

3. Exchange Act--Antifraud--Accountants--Audits--Disclosure Duty.--An accounting firm that acted as the auditor for two of an issuer's subsidiaries, but not as the accountant for the issuer, could be found to have violated a duty to disclose negative information to the public, by allegedly failing to disclose claimed false information contained in the issuer's Form 10-K, which the accounting firm allegedly knew to be false. When the auditor of a subsidiary knows of the fraudulent activities of the parent, it has a duty to disclose this information. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

4. Exchange Act--Antifraud--Accountants--Fraud on the Market--Reliance.--Stock purchasers adequately alleged reliance through the fraud on the market theory in their antifraud claim brought against an accounting firm that

acted as the auditor for two of the issuer's subsidiaries, but not as the accountant for the issuer. The purchasers alleged that by not revealing information that the accounting firm had a duty to reveal, the accounting firm contributed to the claimed fraud on the market that led to the increased price of the issuer's stock. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

5. Exchange Act--Antifraud--Aiding and Abetting--Accountants.--Stock purchasers sufficiently alleged a Section 10(b) aiding and abetting claim against an accounting firm that acted as the auditor for two of the issuer's subsidiaries, but not as the accountant for the issuer. The purchasers alleged sufficient facts, such as (1) the accounting firm's active attempts to avoid consolidating one subsidiary's financial statements with the issuer's and (2) the accounting firm's failure to disclose relevant information after the publication of the issuer's Form 10-K, that the accounting firm knowingly and substantially participated in the alleged fraud. Merely because the accounting firm did not publish the Form 10-K did not mean that the firm could not know of the alleged fraud and actively aid in perpetuating it through the alleged activities. See FSLR P22,721 and FSLR

P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

6. Exchange Act--Antifraud--Aiding and Abetting--Underwriters--Knowledge.-- Stock purchasers alleged a sufficient degree of knowledge in a Section 10(b) aiding and abetting claim against an underwriter. The complaint specifically alleged that the underwriter knew that a large number of unauthorized shares had been issued by the issuer, knew that these shares were not transferable, and yet sold the shares on the open market, which aided and abetted the claimed overall scheme. See FSLR P22,721 and FSLR P22,725, "Exchange Act --Manipulations; National Market System" division, Volume 3.

7. Securities Act--Liabilities--Sellers--Underwriters.-- Allegations that an underwriter's prospectus failed to disclose that the shares it was offering were unauthorized met the requirements for alleging a Section 12(2) violation. See FSLR P4735, "Securities Act--Liabilities" division, Volume 2.

8. Securities Act--Liabilities--Sellers--Reliance.--A Section 12(2) claim by stock purchasers could not be dismissed on grounds of inadequate allegations of reliance, since the purchasers were not required to

show reliance on the actual prospectus, but only that the prospectus contained misrepresentations or omitted material facts, and the purchasers alleged that there were inaccuracies in the prospectus. See FSLR P4735, "Securities Act --Liabilities" division, Volume 2.

9. Securities Act--Liabilities--Sellers--Initial Offerings.--In a Section 12(2) claim, plaintiff stock purchasers sufficiently alleged that the shares at issue were purchased from the defendant underwriter through an initial offering, in that the purchasers alleged that the underwriter's sales through the subject prospectus were initial offerings to the public and that the underwriter sold unregistered shares received from the issuer directly to the purchasers. See FSLR P4735, "Securities Act--Liabilities" division, Volume 2.

10. Exchange Act--Antifraud--Broker-Dealers--Scienter.--Stock purchasers adequately alleged the requisite "severe recklessness" in a Section 10(b) claim against a brokerage firm, in alleging that the firm represented that it had undertaken an extensive independent investigation of the issuer prior to recommending the issuer's securities, and that it had continuously reassessed its evaluation of the issuer. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

11. Exchange Act--Antifraud--Aiding and Abetting--Broker-Dealers--Scienter.-- Investors adequately alleged sufficient activity on the part of a brokerage firm to indicate the requisite scienter necessary to maintain a Section 10(b) aiding and abetting claim against the firm. The investors alleged that the firm engaged in touting stock in a company that the firm said it had researched, when, in fact, that company was in severe financial trouble and had issued a fraudulent Form 10-K. See FSLR P22,721 and FSLR P22,725, "Exchange Act--Manipulations; National Market System" division, Volume 3.

Opinion of Nesbitt, District Judge.

This cause comes before the Court upon the Report and Recommendation of Magistrate Judge Barry L. Garber, filed May 19, 1993 (D.E. #219), regarding Defendant Deltec Securities Corporation's ("Deltec") Motion to Dismiss, filed September 16, 1992 (D.E. #128), Defendant Gunster, Yoakley & Stewart, P.A.'s ("GY&S") Motion to Dismiss, filed September 15, 1992 (D.E. #130), Defendants Aaron Karp, Howard Sommers, and Karp and Sommers's (collectively "K&S") Motion to Dismiss, filed September 30, 1992 (D.E. #147), Defendant Coopers & Lybrand's ("C&L") Motion to Dismiss, filed September

30, 1992 (D.E. #151), and Defendant Raymond James's Motion to Dismiss, filed October 1, 1992 (D.E. #155).[108]

I. BACKGROUND

This action arises from the allegedly fraudulent activities of two law firms, an accounting firm, a securities broker, and an underwriter, as well as the officers and directors of the corporation, in relation to the issuance of shares of stock in Cascade International, Inc. ("Cascade"). Cascade was a publicly traded company made up of three divisions: cosmetics, fashion boutiques, and women's apparel stores. Throughout the late 1980s, Cascade acquired a number of clothing stores, and had intended to sell cosmetics fromcounters within these stores. By 1991, however, the Securities and Exchange Commission ("SEC") had begun to investigate Cascade, and in December of 1991, Cascade filed for bankruptcy after revelations that it had grossly misrepresented the number of cosmetic stores it operated, and after its President and Chief Executive Officer, Victor Incendy, had disappeared.

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108. While Plaintiffs' Consolidated Amended Class Action Complaint, filed July 7, 1992 (D.E. #79) ("Complaint") alleges violations against defendants other than the above five, only these five groups of defendants, K&S, GY&S, C&L, Deltec, and Raymond James (collectively "Defendants") chose to file motions to dismiss.

In July of 1991, a number of complaints were filed in federal court by purchasers of the common stock of Cascade which primarily alleged violations of the securities laws against the above-named Defendants. These actions were soon consolidated into one class action, and this consolidated action was given multi-district litigation status.

In their class action complaint, Plaintiffs accuse all Defendants of making materially misleading statements or omissions. Specifically, K&S, a law firm, is accused of making misrepresentations in Cascade's filings with the SEC. GY&S, another law firm, is accused of making misleading statements, allegedly in an attempt to hide Cascade's fraudulent activity, to people who were investigating the strength of Cascade. Plaintiffs allege that C&L, an accounting firm, made fraudulent misrepresentations in the process of auditing two of the subsidiaries of Cascade, Fran's Fashions, Inc., and Conston, which were retailers of women's clothing. C&L is also accused of furthering the fraudulent activity by failing to disclose that Cascade's filings with the SEC were highly inaccurate. Raymond James, a securities broker, is accused of making false misrepresentations in the process of selling Cascade's stock. Finally, Plaintiffs allege that Deltec, an underwriter for Cascade's stock, acquired over a million unregistered

shares from Cascade which it sold on the market in violation of the securities laws.

The Complaint alleges violations by all Defendants of S10(b) of the Securities Exchange Act of 1934, 15 U.S.C. S78j(b) ("S10(b)"), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. S240.10b-5 ("Rule 10b-5"), as well as alleges state common law claims for negligent misrepresentation and fraud. In addition, the Complaint also alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RIC0"), 18 U.S.C. S1961 et seq., against K&S, only, and alleges that Deltec violated SS12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. S77l(1)-(2)("S12"). The accused Defendants have moved to dismiss these allegations.

Magistrate Judge Barry L. Garber, in his Report and Recommendation filed May 17, 1993 (D.E. #219), recommended that all counts be dismissed against the law firms, K&S and GY&S, because Plaintiffs, inter alia, had failed to establish a duty to disclose on the part of a law firm to individuals with which the law firm did not have a fiduciary relationship. The Magistrate Judge also recommended that the counts for common law negligent misrepresentation and fraud be dismissed as to all Defendants for Plaintiffs' failure to adequately allege their reliance on the alleged misrepresentations or omissions made by Defendants. All

other counts, the Magistrate Judge stated, should not be dismissed, as Plaintiffs have adequately alleged all elements of these causes of actions.

All parties have filed objections and responses to the Magistrate Judge's Report and Recommendation. The Court is required to conduct a de novo review of both these objections and the original motions to dismiss. 28 U.S.C. S636(b)(1) (1993) ("A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.")

II. STANDARD OF REVIEW

The standard of review for a motion to dismiss has been clearly established. Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989). However, the Court is confined to a review of the allegations pleaded in the Complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the non-movant. See Quinones v. Durkis, 638 F. Supp. 856, 858 (S.D. Fla. 1986). Thus, a claim may be dismissed pursuant to Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts consistent with the allega-

tions. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Furthermore, Rule 9(b) of the Federal Rules of Civil Procedure requires that any allegations of fraud in a complaint must be stated with particularity.[109] However, while Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the `precise misconduct with which they are charged,'" the requirements of Rule 9(b) "must not abrogate the concept of notice pleading." Durham v. Business Management Associates, 847 F.2d 1505, 1511 (11th Cir. 1988) (quoting Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3rd Cir. 1984), cert. denied, 469 U.S. 1211 (1985)); (quoting Friedlander v. Nims, 755 F.2d 810, 813 n.3 (11th Cir. 1985)). Therefore, "while mere conclusory allegations of fraud will not satisfy Rule 9(b), allegations which provide a reasonable delineation of the underlying acts and transactions allegedly constituting the fraud are sufficient." In re Sahlen & Associates, Inc. Securities Litigation, 773 F. Supp. 342, 352 (S.D. Fla. 1991).

Applying these principles, and after careful consideration of the Magistrate Judge's Report and Recommendation

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109. Rule 9(b), Fraud, Mistake, Condition of the Mind, states that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

and a de novo review of the record, it is hereby ORDERED and ADJUDGED that the Report and Recommendation is adopted in its entirety for the reasons set forth below.

III. DEFENDANTS AARON KARP, HOWARD SOMMERS, KARP AND SOMMERS, AND GUNSTER, YOAKLEY & STEWART, P.A.

In summary, the Magistrate Judge recommended that all counts of the Complaint be dismissed against the two law firms, K&S and GY&S, because Plaintiffs failed to demonstrate a law firm's duty to disclose negative information about a client to anyone with whom the law firm does not have a fiduciary relationship.

Plaintiffs object to this recommendation by stating that K&S helped prepare Cascade's fraudulent filings with the SEC, as well as drafted letters to shareholders and press releases which stated erroneous facts. Plaintiffs also argue that GY&S violated the securities laws by defending Cascade against accusations made by the press, securities analysts, and members of the public that the company was in financial difficulty, without investigating whether the representations made by GY&S on behalf of Cascade were true, as well as threatening those individuals with legal action if they investigated Cascade or published articles about the financial condition of the company. Also, Plaintiffs ac-

cuse GY&S of giving advice to Cascade without properly and fully investigating their client. Plaintiffs further argue that both firms discovered and ignored numerous "red flags," i.e., facts which Plaintiffs allege should have made the defendant law firms aware that Cascade was committing fraud, or at least compelled them to investigate their client.

Defendants K&S and GY&S respond by arguing that any representations that they made were only done on behalf of the client and were not representations made on behalf off the law firms to third parties, that the law firms were mere "scriveners" for Cascade, and that they had no fiduciary relationship, and thus no duty, to anyone but Cascade. Furthermore, the law firms argue, they never issued legal opinions to the general public but only to their client Cascade. The law firms also argue that they had no duty to investigate Cascade, no duty to "tattle" on their client, and had, in fact, an ethical duty not to reveal client confidences. Attorneys, the law firms argue, do not have the same duties as other professionals, like accountants and securities brokers, because they do not represent their own opinions about their client, but only act as a conduit for the client's opinions.

A. 10(b) and Rule 10b-5 Allegations

As the Magistrate Judge correctly determined, in order for a cause of action to be maintained under S10(b)[110] and Rule 10b-5,[111] a plaintiff must allege that a defendant made a misstatement or omission of a material fact. Moreover, most circuits, including the Eleventh Circuit, have held that a defendant's misstatement or omission is actionable under

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110. 15 U.S.C. S78j, Manipulative and deceptive devices, provides that:

> It shall be unlawful for any person, directly or indirectly. . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

111. 17 C.F.R. S240.10b-5, Employment of manipulative and deceptive devices, provides that:

> It shall be unlawful for any person, directly or indirectly . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

S10(b) and Rule 10b-5 only if the defendant had a duty to disclose negative information to the plaintiff. See Rudolph v. Arthur Anderson & Co., 800 F.2d 1040, 1043 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987) ("Rule 10b-5, however, is not read literally. Instead, a defendant's omission to state a material fact is proscribed only when the defendant has a duty to disclose."). While the Eleventh Circuit has found a duty to disclose when the defendant was an accountant, see Rudolph, 800 F.2d at 1043 (quoting Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir. 1975)), or a banker, see Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004 (11th Cir. 1985), there has been no decision in this circuit specifically creating this duty to disclose on the part of an attorney.

However, the Fourth, Fifth, and Seventh Circuits have all held that an attorney does not have a duty to disclose potentially negative information about a client to a third party absent some kind of fiduciary relationship with the third party. See Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1475 (1992); Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988), cert. denied, 492 U.S. 918 (1989); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Cir. 1986). Furthermore, the Eleventh Circuit has established a set of factors which a court must consider in weighing whether a professional had a duty to disclose

negative information to the general public about a client. As Rudolph explained:

> In evaluating the circumstances, `we consider the relationship between the plaintiff and defendant, the parties' relative access to the information to be disclosed, the benefit derived by the defendant from the purchase or sale, defendant's awareness of plaintiff's reliance on defendant in making its investment decision, and defendant's role in initiating the purchase or sale.'

Rudolph, 800 F.2d, at 1043 (quoting, Woodward, 522 F.2d at 97 n.28). The Court must look at the circumstances of each case in determining, whether a duty to disclose exists. Woodward, 522 F.2d at 97 n.28., Reviewing these factors and the facts of this case, the Court concludes that few, if any, of the factors are supported by the allegations in the Complaint. Therefore, the Court finds that Rudolph does not warrant the creation of a duty to disclose negative information, about a client on the part of an attorney.

As Plaintiffs have failed to demonstrate any kind of fiduciary relationship between the defendant law firms and Plaintiffs, no duty to disclose exists, and, therefore, no action for securities fraud can be maintained against the

defendant law firms. While Plaintiffs cite many cases in which a court allowed an action to progress against a lawyer or law firm, these cases involved direct misrepresentations made by the defendant law firm to a plaintiff with which the law firm had a fiduciary relationship. See, e.g., FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992) (finding a duty when law firm prepared documents to investors); Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir. 1991) (finding duty when law firm was in charge with editing public documents it knew to be false). Here, although GY&S may have made misrepresentations to parties other than their clients, Plaintiffs have not alleged a fiduciary relationship between GY&S and a third party to establish a duty to disclose. Accordingly, the counts alleging primary violation of S10(b) and Rule 10(b)-5 must be dismissed against the defendant law firms.

Plaintiffs argue that to dismiss the defendant law firms because they had no duty to disclose negative information to the public would allow law firms to act with impunity in issuing misleading legal opinions. However, what Plaintiffs fail to admit is that the actions of these law firms did not rise to such a level that they were expected to give full and accurate representations to third parties. These law firms represented Cascade, not any third party, and therefore did not have duty to investigate their client. While Plaintiffs claim a great injustice would be done to pur-

chasers of Cascade stock if these law firms were to be dismissed from the suit, this Court does not believe that the current law requires a law firm to direct its activities from representation to investigation of their clients at the slightest suggestion that their clients may be involved in unsavory activities. The Court will not go so far as to require law firms to fully investigate their clients at any hint that they may be conducting fraudulent activities, and then to punish the law firms if they do not do so. Otherwise, the law firms would be charged with a duty to the public at large to "tattle" on their clients. See Abell, 858 F.2d 1104, 1133 (quoting Barker, 797 F.2d at 497) (" `Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose.' "). For all their rhetoric, Plaintiffs have failed to indicate what duty the defendant law firms had. As Plaintiffs have failed to allege that the law firms represented them, no duty has been created between, them or with the public at large, and, therefore, the counts for primary violations of S10(b) and Rule 10b-5 cannot be maintained and must be dismissed.

B. Aiding and Abetting Allegations

Plaintiffs' Complaint also alleges liability on the part of the defendant law firms K&S and GY&S for aiding and abetting securities fraud. The Magistrate Judge recom-

mended that these counts be dismissed as well, because Plaintiffs have failed to allege facts which indicate that the defendant law firms had the conscious intent necessary to maintain an action for aiding and abetting.

Plaintiffs argue in their objection that the fact that the defendant law firms ignored the numerous "red flags," as well as their active participation in threatening third parties with legal action if they investigated Cascade, demonstrates the high degree of knowledge, or scienter, necessary to maintain the aiding and abetting counts. Plaintiffs also argue that the "atypical" activities of the law firms in the manner in which they represented and defended Cascade is sufficient evidence to demonstrate the requisite scienter.

Defendants respond by stating that none of their activities were atypical, nor do Plaintiffs allege any facts sufficient to demonstrate sufficient knowledge on the part of the defendant law firms to be aiders and abettors.

As the Magistrate Judge correctly ascertained, the elements for aiding and abetting securities fraud are:

> `some other party has committed a securities law violation, . . . the accused party has general awareness that his role was part of an overall activity that is im-

proper, and . . . the accused aider-abettor knowingly and substantially assisted the violation.'

Woodward, 522 F.2d at 94-95 (quoting S.E.C. v. Coffey, 493 F.2d 1304, (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975)). Looking specifically at the third element, Plaintiffs must demonstrate that Defendants "knowingly" assisted the violation, in other words, that they possessed the requisite scienter. Applicable precedent instructs that an evaluation of whether a defendant knowingly assists in the fraud "turns upon whether the aider and abettor defendant owed a duty to the plaintiff." Schatz, 943 F.2d at 496. If the defendant is under no duty to disclose, then the complaint must allege that the defendant acted with "a high degree of scienter, that is, with a `conscious intent' to aid the fraud." Woods, 765 F.2d at 1010. See also Schatz, 943 F.2d at 496 ("When there is no duty running from the alleged aider and abettor to the plaintiff, the defendant must possess a `high conscious intent' and a `conscious and specific motivation' to aid the fraud").

As previously determined in section III.A., supra, neither of the two law firms were under a duty to disclose their client's activities, and, therefore, Plaintiffs must demonstrate "conscious intent" on the part of Defendants to maintain the aiding and abetting counts of the Complaint. However, Plaintiffs have failed to sufficiently allege the

requisite degree of scienter. Plaintiffs argue that the allegations in their Complaint which assert that GY&S made statements to individuals others than their client establishes the requisite "conscious intent" necessary to meet this element. Furthermore, the numerous "red flags" should have warned the law firms of Cascade's fraudulent activity, and their failure to investigate their client demonstrated "conscious intent" to aid and abet the fraudulent activity.

However, "red flags," or "aroused suspicions," "do not constitute actual awareness of one's role in a fraudulent scheme." Abell, 858 F.2d at 1128. Furthermore, when no duty to disclose exists, "allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim." Schatz, 943 F.2d at 496. Thus, allegations that the law firms merely failed to investigate their client is not sufficient to establish an aiding and abetting claim.

Moreover, as Woodward explained:

> In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws. Con-

versely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.

Woodward, 522 F.2d at 97. Here, when allegations of the alleged "red flags" are removed, in accordance with Abell, Plaintiffs' Complaint fails to demonstrate how the law firms' actions of merely rendering legal opinions or coming to the defense of their client demonstrated more than activity constituting the "daily grist of the mill" of a law firm.

In addition, Plaintiffs have failed to demonstrate the existence of any "substantial assistance" on the part of Defendants as required by the aiding and abetting cause of action. This element has been defined as requiring more than allegations that the law firm acted as a scrivener for the client, but that the law firm "actively participate[d] in soliciting sales or negotiating terms of the deal on behalf of a client. . . ." Schatz, 943 F.2d at 497. The Court finds, in accordance with the Magistrate Judge's recommendation, that Plaintiffs have failed to allege any activities on the part of K&S and GY&S that constituted anything more than acting as scriveners for their clients or conducting activities that make up the "daily grist of the mill."

Therefore, without clear proof of intent to violate the securities laws, the Complaint fails to adequately allege

proper claims against K&S and GY&S for aiding and abetting securities fraud. Accordingly, those counts of the Complaint must also be dismissed.

C. RICO violations against Karp & Sommers

Plaintiffs have asserted claims against Defendant Karp & Sommers for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. SS1962(a)-(d), either as primary participants or as aiders and abettors.[112] The Magistrate Judge recommended that these counts be dismissed because Plaintiffs have failed to allege sufficient knowledge on the part of K&S of the fraudulent activity. Plaintiffs argue that the Complaint is replete with references to K&S's failure to investigate whether the large number of cosmetic counters Cascade represented to the public that it owned and operated actually existed. Defendant K&S responds that mere allegations that a law firm failed to investigate its client and drafted documents on behalf of its client are insufficient to demonstrate a RICO violation, and that mere reckless disregard for the activities of the client does not establish a RICO claim.

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112. 18 U.S.C. S1964(d) provides for civil remedies for violations of S1962.

In order for a count for RICO violations to survive a motion to dismiss, the Complaint must allege "two acts of racketeering with enough specificity to show that there is probable cause the crimes were committed. That determination is possible only if the factual basis of the predicate acts is set out with specificity." Banco de Desarrollo Agropecuario, S.A. v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986). Again, Plaintiffs have failed to demonstrate in their Complaint the requisite intent to defraud, and, therefore, have failed to sufficiently allege the factual basis of the predicate acts. Plaintiffs' only support for Defendants' knowledge is that the law firms allegedly drafted false press releases and recklessly disregarded facts about the financial condition of Cascade. However, reckless disregard is not a sufficient level of intent to allege the underlying crime. Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 660 F. Supp. 1362, 1370 (D. Conn. 1987) ("Mere reckless disregard of the truth when drafting documents does not justify a finding of RICO civil liability on the basis that the party participated in the illegal enterprise."). Thus, to pursue an action for civil RICO, Plaintiffs must demonstrate Defendant's intentional participation in the conduct and affairs of the RICO enterprise. Becks v. Emery-Richardson, Inc., Nos. 86-6866-CIV-GONZALEZ, 87-1554-CIV-GONZALEZ, 1990 WL 303548, at *37 (S.D. Fla. Dec. 21, 1990). Plaintiffs have not alleged

K&S's intentional participation in the affairs of Cascade, and, therefore, the Complaint as to the RICO counts against K&S must be dismissed.

Furthermore, the Supreme Court, in a decision handed down this year, significantly limited the application of the RICO statute in civil suits. See Reves v. Ernst & Young, __ U.S. __, 113 S.Ct. 1163 (1993). Looking specifically at the language of S1962(c), the Court held that in order " `to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' S1962(c), one must participate in the operation or management of the enterprise itself." Id. at 1173. As Plaintiffs have demonstrated no evidence that the defendant law firms participated in the operation or management of Cascade, Plaintiffs' S1962(c) RICO claims, as well as all other claims brought pursuant to the RICO act, must be dismissed.

D. State Law Claims

The Court agrees with the Magistrate Judge's finding that because all of the federal claims have been dismissed from the Complaint as to K&S and GY&S, the Court should no longer exercise its pendent jurisdiction over the state claims.[113] Rice v. Branigar Organization, Inc., 922

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113. The state common law causes of actions for fraud and negligent misrepresentation should also be dismissed against the defen-

F.2d 788, 792 (11th Cir. 1991) ("When a district court dismisses all of the federal claims before trial, the decision whether or not to exercise pendent jurisdiction over state-law claims is within its discretion."). See also L.M.E., Inc. v. City of Hollywood, 605 F. Supp. 185, 190 (S.D. Fla. 1985). Accordingly, the pendent state claims against KY&S and GY&S should be dismissed as well.

E. Ethical violations

Nothing in this opinion should be read to indicate that the Court condones the actions of these two law firms, or that because they are to be dismissed from this entire action that they are entirely blameless in this fraud. The Court, as courts have held in the past, cannot express an opinion as to whether what the law firms did violated the rules of ethics. As both the Fourth and Seventh Circuit have stated:

> [A]n award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal . . . profession[]. Liability depends on an existing duty to disclose. The securities laws therefore must lag behind changes in ethical and fiduciary standards.

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dant law firms for failure to allege any reliance by Plaintiffs on statements made by the defendant law firms. See section VII, infra.

Schatz, 943 F.2d at 498 (quoting Barker, 797 F.2d at 497 (7th Cir. 1986)). This Court joins in agreement with that statement, and is bound by Plaintiffs' Complaint and the elements of the causes of action in considering whether the counts against the two law firms should be dismissed.

IV. COOPERS & LYBRAND

The Magistrate Judge recommended that the count for securities violations against the accounting firm Coopers & Lybrand should be allowed to remain, as Plaintiffs had sufficiently alleged all the requisite elements of a S10(b) and Rule 10b-5 claim. C&L objects to this recommendation by arguing that it did not act as the accountant for Cascade but only as the auditor for two of Cascade's subsidiaries, Fran's and Conston. Specifically, C&L argues that the only allegations of fraudulent misrepresentations in Plaintiffs' Complaint, as they relate to C&L, occur in reference to Cascade's 1991 10-K form, which C&L did not prepare.

Plaintiffs respond by arguing that their Complaint sufficiently demonstrates that C&L was not a minimal participant in the auditing of Cascade, but in fact gave extensive advice to Cascade. Plaintiffs argue as evidence of C&L's liability the fact that C&L failed to issue "going concern" opinions on Fran's and Conston despite "red

flags" that Cascade was in financial difficulty, and that C&L failed to consolidate Conston's financial statements with Cascade's, thus allowing Cascade to avoid reporting Conston's significant losses, in violation of established accounting procedures. Furthermore, after C&L received Cascade's 10-K, it failed to withdraw its opinion on Fran's or Conston despite the gross errors it knew were contained in the 10-K.

A. S10(b) and Rule 10b-5

1. Duty to Disclose

Defendant Coopers & Lybrand argue that, like the defendant law firms, an accounting firm also has no duty to disclose negative information about a company to the public when the accounting firm did not participate in preparing the financial statements of the main corporation (here, Cascade), but only participated in preparing the financial statements of two of the corporation's subsidiaries. More importantly, C&L argues that it did not aid in the preparation of Cascade's 1991 10-K form which stated, erroneously, that Cascade owned 126 Fran's stores. Therefore, C&L bad no duty to disclose any of the alleged fraud, as it was not the perpetrator of any of the fraud.

This position, however, is contrary to the applicable precedent in the Eleventh Circuit. In Rudolph, the court denied a motion to dismiss filed by an accounting firm on the grounds that an accountant stands in a "special position of trust vis-a-vis the public," noting that an accountant has a "duty to safeguard the public interest." Rudolph, 800 F.2d at 1044. Because the public relies on an accountant's representations when making fraudulent decisions, and because the costs to an accountant of revealing potentially negative information is minimal, the accountant has a duty to disclose this information when preparing other accounting documents which rely on this negative information, regardless of whether it originally prepared the misleading documents. Plaintiffs are not arguing, as C&L believes they are, that an auditor of a subsidiary will always be liable for the fraud of the parent. However, when the auditor of a subsidiary knows of the fraudulent activities of the parent, it has a duty to disclose this information.

Accordingly, although C&L did not prepare Cascade's 1991 10-K form, Plaintiffs have demonstrated a set of facts which, if true, would entitle them to relief. By failing to disclose the false information contained in Cascade's 1991 10-K, which C&L knew to be false, C&L violated the duty to disclose negative information to the public recognized by Rudolph.

2. Reliance

In order for Plaintiffs to adequately allege a securities fraud violation against any defendant, they must allege that Plaintiffs somehow relied on the misrepresentations or omissions of that defendant. Ross v. Bank South, N.A., 885 F.2d 723, 728 (11th Cir. 1989), cert. denied, 495 U.S. 905 (1990). To satisfy this element, Plaintiffs allege the "fraud on the market" theory, which basically creates a presumption of reliance, when no individual reliance can be demonstrated, by accepting that, in a developed securities market, the material information published by the defendant is reflected in the price of the stock. See Basic Inc. v. Levinson, 485 U.S. 224, 241-42 (1988); Lipton v. Documation, Inc., 734 F.2d 740, 745-46 (11th Cir. 1984), cert. denied, 469 U.S. 1132 (1985). The Magistrate Judge accepted this theory to satisfy the element of reliance.

C&L objected to this finding of reliance, stating that at no time did they ever make public statements about Cascade, but only about the subsidiaries Fran's and Conston. However, Plaintiffs argue that by not revealing information that C&L had a duty to reveal, C&L contributed to the fraud on the market which led to the increased price of Cascade's stock. This allegation, if taken as true, would set forth adequate evidence of reliance through the fraud on

the market theory, and, therefore, Plaintiffs have met their burden as to this element.[114]

As Plaintiffs have established sufficient support for all the elements of a primary violation of 10(b) and Rule 10b-5, this count will not be dismissed as to C&L.

B. Aiding and Abetting

Plaintiffs also allege that C&L aided and abetted the violation of the securities laws. The Magistrate Judge, citing to Plaintiffs' allegations that C&L knew that Cascade was representing that it had more Fran's stores than it did, that it avoided consolidating the Conston financial statements with Cascade's, and that it knowingly violated established accounting procedures, recommended that this count against C&L should not be dismissed. C&L objects to this recommendation by stating that since it was not Cascade's auditor, it could not have knowledge of nor participate in any fraud. Furthermore, Plaintiffs do not have standing to

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114. C&L argues that since they did not have a duty to disclose, and since they could not have made misrepresentations or omissions about Cascade, but only about Cascade's subsidiaries, Plaintiffs cannot demonstrate transaction or loss causation. As the Court has found that a duty to disclose could exist, and that C&L may have failed to disclose information that it had a duty to disclose, the Court has no hesitancy in finding that Plaintiffs have alleged that the actions of C&L encouraged them to invest (transaction causation) and contributed to their economic harm (loss causation). See Sahlen, 773 F. Supp. at 359-60.

sue as the audit reports were of the subsidiaries and not of Cascade.

However, as has been previously discussed, Plaintiffs have alleged sufficient facts, such as their active attempts to avoid consolidating Conston and their failure to disclose relevant information after the publication of the 1991 10-K, that C&L knowingly and substantially participated in the fraud. Therefore, the motion to dismiss should not be granted. Merely because C&L did not publish the 1991 10-K does not mean that they could not know of the fraud and actively aid in perpetuating it through the other enumerated activities.

V. DELTEC ASSET MANAGEMENT

Plaintiffs have not asserted a S10(b) or Rule 10b-5 allegation against Defendant Deltec, but instead have alleged both an aiding and abetting violation, as well as S12 violations, against Deltec. Deltec, in its objection to the Magistrate Judge's Report and Recommendation, requests that Count I of the Complaint be dismissed insofar as it seeks to impose primary liability against Deltec for S10(b) and Rule 10b-5 violations. As Plaintiffs do not object to this request, and as no allegations of a primary violation against Deltec are made in the Complaint, the part of Count

I that alleges a primary violation against Deltec is DISMISSED.

A. Aiding and Abetting

The Magistrate Judge found that Plaintiffs had pled sufficient evidence of knowledge on the part of Deltec to prevent the claim for aiding and abetting from being dismissed. Specifically, the Complaint alleges that Deltec knowingly received unauthorized shares of stock from Cascade, which it then sold on the open market.

Deltec argues that Plaintiffs must plead with specificity "conscious intent" on the part of Deltec that it was participating in the fraud in order to survive a motion to dismiss, and that the mere ignoring of "red flags" is not sufficient activity to reach the high degree of knowledge required. However, Plaintiffs' Complaint specifically alleges that Deltec knew that a large number of unauthorized shares had been issued by Cascade, knew that these shares were not transferable, yet sold those shares on the open market, which aided and abetted the overall scheme. (Compl. P224, 226). If true, these allegations establish the sufficient degree of knowledge on the part of Deltec, and at this stage in the proceedings, dismissing this count is unwarranted.

B. Section 12

Plaintiffs have also sued Deltec under Sections 12(1) and 12(2) of the Securities Act of 1933.[115] The Magistrate Judge recommended that these counts should not be dismissed, as Deltec sold securities of value to some of the class

plaintiffs through an initial offering which was accompanied by a prospectus that contained misstatements or omissions. Deltec objects, arguing that the Complaint fails to indicate that any plaintiff bought shares of Cascade from Deltec, that no prospectus was issued, and that Deltec did not sell these shares through an initial offering.

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115. 15 U.S.C. S77l, Civil liabilities arising in connection with prospectuses and communications, provides that:

> Any person who--
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> (1) offers or sells a security in violation of section 77e of this title, or
>
> (2) offers or sells a security. . .by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing the security from him. . . .

Plaintiffs adequately allege in their Complaint that one or more of the class plaintiffs may have bought shares from Deltec. (See Compl. P403). This is sufficient to meet this element of a S12(1) cause of action.

Plaintiffs also have clearly alleged in their Complaint that Deltec's January 4, 1990, prospectus failed to allege that the shares it was offering were unauthorized. (Compl. P409). If true, these allegations meet the requirements of a S12(2) violation.

Deltec further argues that Plaintiffs must allege reliance by the purchasing plaintiff on the prospectus. However, in Currie v. Cayman Resources Corp., 835 F.2d 780, 782 (11th Cir. 1988), the Eleventh Circuit held that " `plaintiffs need not prove that they relied in any way on the alleged misrepresentations or omissions.' " (quoting Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 695 (5th Cir. 1971). Consequently, Plaintiffs need not show reliance on the actual prospectus but must only show that Deltec's prospectus contained misrepresentations or omitted material facts in order for Plaintiffs to maintain a S12(2) cause of action. As Plaintiffs have alleged that there were inaccuracies in the prospectus, this count should not be dismissed on the grounds of inadequate allegations of reliance.

Deltec also argues that S12(2) only applies to sellers of stocks during an initial offering. Plaintiffs have alleged that Deltec's sales through the January 4, 1990, prospectus were initial offerings to the public and that Deltec sold unregistered shares received from Cascade directly to Plaintiffs. These allegations, if true, are sufficient to allege that the shares at issue were purchased by Plaintiffs from Deltec through an initial offering.

Finally, Deltec argues that Plaintiffs have not alleged fraud with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. However, the Complaint does specify the fraud Deltec allegedly engaged in through the selling of unauthorized shares and the failure to mention this in their prospectus. The Court finds that this is sufficient specificity under Rule 9(b) to withstand a motion to dismiss at this stage of the proceedings.

As Plaintiffs have adequately alleged all elements of S12 violations, this count of the Complaint shall not be dismised.

VI. RAYMOND JAMES

The Magistrate Judge recommended that the counts for primary and secondary violations of S10(b) and Rule10b-5 against Raymond James, the securities broker, should not

be dismissed. Plaintiffs have alleged that Raymond James issued misleading reports about the number of stores Cascade operated and about the strength and prospects of the corporation.

A. Primary violations

Raymond James argues that because the omissions in their reports were not material, and because Plaintiffs have failed to allege the requisite scienter, the count for primary violations of the securities laws should be dismissed.
First, Raymond James asserts that its omissions were not material because the omitted facts were part of the "total mix" of information available to the public. Whether the omissions were material or were part of the "total mix" of information in the market is not a decision to be made at the motion to dismiss stage, and is better reserved for, as the Magistrate Judge found, a motion for summary judgment.

Second, as the Magistrate Judge found, the Complaint adequately alleges the "severe recklessness" required in a S10(b) count. See McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989) ("the rule of this Circuit is that a showing of `severe recklessness' satisfies the scienter requirement"). Plaintiffs state that Raymond James represented that it had undertaken an extensive inde-

pendent investigation of Cascade prior to recommending the company's securities, and that it had continuously reassessed its evaluation of the company. (Comp. PP158, 159.)

B. Aiding and Abetting

While the Magistrate Judge did not extensively review the aiding and abetting count as it applied to Raymond James, the Court finds that he was correct in his recommendation that the count should not be dismissed. Plaintiffs have adequately alleged sufficient activity on the part of Raymond James to indicate the requisite scienter necessary to maintain an aiding and abetting allegation. Specifically, Raymond James engaged in touting stock in a company which it said it had researched, when, in fact, that company was in severe financial trouble and had issued a fraudulent 10-K. At the motion to dismiss stage, it is premature to dismiss this count because, if true, the Plaintiffs may prevail.

VII. STATE LAW CLAIMS

While the pendant state law claims for fraud and negligent misrepresentation may be dismissed against Defendants K&S and GY&S, because the federal cause of action against these defendants are no longer viable,[116] the

pendent state law claims should also be dismissed, as well as the similar counts against all Defendants, for failure to state a claim upon which relief can be granted.

A. Fraud

As the Magistrate Judge correctly determined, one of the elements of common law fraud in Florida is reliance by Plaintiffs on the false representations of the Defendants. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985). However, Florida does not recognize a "fraud on the market" theory to establish reliance, but requires allegations of actual reliance. Sahlen, 773 F. Supp. at 371. As in Sahlen, the Complaint here fails to allege actual reliance by Plaintiffs on specific representations made by Defendants, but instead only alleges the more general reliance on the market as a whole, which is effected by the false representations of Defendants. Accordingly, the count for fraud as to all Defendants must be dismissed.

B. Negligent Misrepresentation

Actual reliance is also one of the elements for a negligent misrepresentation cause of action. See Atlantic

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116. See cases cited infra section III.D.

Nat. Bank of Florida v. Vest, 480 So. 2d 1328 (Fla. 2nd Dist. Ct. App. 1985), rev. denied, 491 So. 2d 281 (Fla. 1986). As the Magistrate Judge determined, no allegation in the Complaint states that any Defendant made its negligent misrepresentation with the intent that Plaintiffs would rely on that representation in purchasing Cascade stock. Therefore, the negligent misrepresentation count against all Defendants must also be dismissed.

VIII. CONCLUSION

Accordingly, it is hereby ORDERED and ADJUDGED that:

1. Defendant Deltec Securities Corporation's Motion to Dismiss, filed September 16, 1992 (D.E. #128), is DENIED in part and GRANTED in part. Count I of the Consolidated Amended Class Action Complaint is DISMISSED only insofar as it seeks to impose primary liability against Deltec for S10(b) and Rule 10b-5 violations. Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Deltec Securities Corporation.

2. Defendant Gunster, Yoakley & Stewart, P.A.'s Motion to Dismiss is GRANTED. Accordingly, Counts I, V

and VII of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Gunster, Yoakley & Stewart, P.A.

3. Defendants Aaron Karp, Howard Sommers, and Karp and Sommers's Motion to Dismiss is GRANTED. Accordingly, Counts I, II, III, IV, V, and VII of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendants Aaron Karp, Howard Sommers, and Karp and Sommers.

4. Defendant Coopers & Lybrand's Motion to Dismiss is DENIED in part and GRANTED in part. Only Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Complaint are DISMISSED as to Defendant Coopers & Lybrand.

5. Defendant Raymond James's Motion to Dismiss is DENIED in part and GRANTED in part. Only Count V (Negligent Misrepresentation) and Count VII (Fraud) of the Consolidated Amended Class Action Complaint are DISMISSED as to Defendant Raymond James.

DONE and ORDERED, in chambers, Miami, Florida, this 15th day of December, 1993.

102 Stat. 662, 28 U.S.C. Section 1257 (June 27, 1988)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATE OF FLORIDA }
MARION COUNTY } **ss.:**

I hereby certify that the foregoing are excerpts from true copies of the materials referenced.

/s/William A. Calvo, III/s/
William A. Calvo, III

SWORN TO BEFORE ME, an official duly authorized to administer oaths, this 15th day of September, 1994, by William A. Calvo, III, to me known.

/s/_____/s/

Notary Public